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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1029

MARVIN MANDEL, W. DALE HESS, WILLIAM A. RODGERS AND IRVIN KOVENS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MARVIN MANDEL, W. DALE HESS, WILLIAM A. RODGERS AND IRVIN KOVENS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Marvin Mandel, W. Dale Hess, William A. Rodgers and Irvin Kovens respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 20, 1979.

In light of the petition for writ of mandamus filed with the Court this date by the Petitioners herein, it would seem appropriate to defer action on the instant certiorari petition pending disposition by this Court of the mandamus question. If mandamus issues, there would plainly be no need for the Court to reach the important legal questions raised herein.

OPINIONS BELOW

On January 11, 1979, after consideration by a three-judge panel, the Fourth Circuit issued an opinion and judgment vacating the judgments of conviction herein and remanding for a new trial. The majority and dissenting opinions are reported at 591 F.2d 1347, and

they are reproduced at pages 17a through 88a of the appendix hereto. On July 20, 1979, after rehearing en banc, an equal division of the Fourth Circuit entered a per curiam order stating that the judgments of conviction "are affirmed by an equally divided court." The per curiam order, together with a dissenting opinion, are reported at 602 F.2d 653, and they appear at pages 7a through 15a of the appendix hereto. On November 1, 1979, upon consideration of the Petitioners' petition for a further rehearing en banc, an enlarged Fourth Circuit, again by an equally divided vote, ordered that the petition be denied. This order and two dissenting opinions have not yet been reported, but they appear at pages 1a through 5a of the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit vacating the convictions was entered on January 11, 1979. A timely petition for rehearing en banc was granted on April 16, 1979, and on July 20, 1979 the Court of Appeals entered an order affirming the convictions "by an equally divided court." A timely petition for further rehearing en banc was denied on November 1, 1979. On November 20, 1979, the Chief Justice extended the time for filing this petition for certiorari to and including December 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED*

1. Whether, in a federal mail fraud prosecution based on alternative theories of bribery and non-disclosure,

* In the event that this Court deems it appropriate to treat the accompanying petition for writ of mandamus as a petition for writ of certiorari, the three Questions Presented in the petition for writ of mandamus (page 5 thereof) are incorporated herein by reference as additional Questions Presented on this petition for writ of certiorari.

the defendants are entitled to specific instructions that the jury must find, beyond a reasonable doubt, that either bribery existed or that the defendants had actual knowledge of the undisclosed facts before convicting the defendants of the alleged mail fraud.

2. Whether the federal mail fraud statute, 18 U.S.C. § 1341, as construed or applied in this case, has been extended impermissibly to allow a jury to find the defendants guilty of participating in an alleged scheme to deprive the citizens, the officials and the General Assembly of the State of Maryland of the best services of the Governor, where (a) the alleged scheme was permitted to be based on non-disclosures of the business relationships between the Governor and his co-defendants, (b) the Government was not required to establish that the Governor was bribed or that he otherwise benefited from his friends' business with the State, and (c) the alleged non-disclosure scheme involved no violation of any duty imposed on the Governor or his co-defendants by pertinent State law or regulation.

3. Whether Congress intended to apply the anti-racketeering provisions of Title IX of the Organized Crime Control Act of 1970 to an individual who commits violations of the mail fraud statute but who is in no way connected with organized crime operations in the United States.

4. Whether Congress intended to impose multiple punishments on businessmen who have been found to have engaged in a series of mailings in furtherance of a single scheme to defraud in violation of both the mail fraud and the anti-racketeering provisions of Title IX of the Organized Crime Control Act of 1970.

5. Whether the criminal forfeiture provisions of § 1963 of Title IX of the Organized Crime Control Act of 1970 violate (a) Article III, Section 3 of the Constitution, (b)

the Due Process Clause of the Fifth Amendment, or (c) the cruel and unusual punishment provisions of the Eighth Amendment.

6. Whether, in a mail fraud prosecution of a Governor of a State for having allegedly schemed to take official positions with respect to pending legislation to benefit his co-defendants, Rule 803(24) of the Federal Rules of Evidence permits the Government to prove the alleged scheme by use of hearsay testimony elicted from State senators as to declarations of third persons where: (a) the hearsay was admittedly based on rumor and gossip arising out of the chaotic first day of a legislative session; (b) the declarants were not identified by those testifying; and (c) the Government did not give the defendants the notice required by Rule 803(24) of the declarants' names and addresses.

7. Where a federal court jury is deadlocked after a week of deliberations upon a retrial of mail fraud and racketeering charges, may the trial judge direct that the jurors continue their deliberations and reconsider their views in light of the fact that "this case is an important one and its presentation to you has involved expense and expenditure of time by both the Government and the Defendants"?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 3:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Federal mail fraud statute, 18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title IX, Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961, et seq.

§ *1961. Definitions.*

> As used in this chapter—
>
> (1) "Racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . . section 1341 (relating to mail fraud) . . . .
>
> * * * * * *
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of

which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * * * *

§ *1962. Prohibited activities.*

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * * * * *

§ *1963. Criminal penalties.*

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Federal Rules of Evidence, Rule 803 (24):

Rule 802. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * * *

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Petitioner Marvin Mandel was Governor of Maryland from 1969 to 1979. Petitioners W. Dale Hess, Harry W. Rodgers, William A. Rodgers and Irvin Kovens are four Maryland businessmen. Petitioner Ernest N. Cory is a Maryland attorney.

Petitioners were convicted in August, 1977, after a jury trial, of mail fraud and racketeering charges under 18 U.S.C. § 1341 and 1961 *et seq.* respectively.[1] Mandel was sentenced to a four-year prison term; Hess, Kovens and Harry Rodgers each received a four-year sentence and a $40,000 fine; William Rodgers was sentenced to twenty months and fined $40,000; and Cory received an

[1] The six Petitioners were each convicted of 15 counts of mail fraud and one count of racketeering. The mail fraud counts all alleged a single scheme, and the separate counts were founded on separate mailings allegedly in furtherance of that scheme. One racketeering charge was dismissed before trial; the jury acquitted the Petitioners of three mail fraud counts; and the trial judge entered judgments of acquittal as to two mail fraud counts and one racketeering count (R. 397-402).

eighteen-month sentence. Additionally, pursuant to 18 U.S.C. § 1963(a), Hess, Kovens, the Rodgerses and Cory were ordered to forfeit stock in Southern Maryland Agricultural Association, Inc., the corporate owner of Marlboro and Bowie racetracks, valued at more than $1,000,000.

The "essence" of the mail fraud charges, as set forth in the indictment and as interpreted in the district court prior to trial, was that the Petitioners had "devised a scheme to defraud the citizens and the State of Maryland by bribing the Governor to assist legislation [during the 1972 session of the Maryland legislature] which would be financially beneficial to the owners of Marlboro [racetrack], the identities of those owners being deliberately concealed from the public, the legislature and Racing Commission by all of the defendants." It was also charged that, as a part of the scheme, the Governor had taken official actions "without revealing to the public" his "own business involvement" with some of the co-defendants, "including those interests in [two real estate ventures] which the Governor had allegedly "received from those defendants as bribes" 415 F. Supp. 997, 1005 (D. Md. 1976) (R. 49-78, 275). The racketeering charges were framed so that commission of any two of the alleged acts of mail fraud would also establish the requisite "pattern of racketeering activity" under the racketeering statute.[2]

As stated by Judges Widener and Russell in their July 20th dissent (Appendix herein, p. 8 *infra*), the prosecution of this "involved case" rested on "fragmented circumstances" with "many of the more essential ones being no more than mere rumor and legislative corridor gossip." The "fragmented circumstances" concerned the sale of Marlboro racetrack in December, 1971, certain legislative action during the 1972 session of the Maryland legislature and various personal and business relationships between Mandel and various of the other Petitioners. The same evidence was offered in support of the mail fraud and racketeering counts.

[2] The acts alleged as the "pattern of racketeering activity" were, alternately, the twenty alleged acts of mail fraud, incorporated into the racketeering counts by reference, and two acts of alleged bribery, the alleged briberies being the same interests in the real estate ventures described in the mail fraud counts (R. 79-86).

The events began in February, 1971, prior to the sale of Marlboro when another Maryland racetrack, Hagerstown, contracted to transfer its racing days to Marlboro (Tr. 5702-03). The transfer of racing days required legislative approval, and the legislature passed a bill authorizing the transfer. On May 21, 1971, Governor Mandel vetoed the bill because he was advised by his Chief Legislative Officer that it was in unconstitutional form (Tr. 5339-40, 7480-87; M. Ex. 38).

The Marlboro owners then attempted to sell their stock. On December 31, 1979, the majority interest in Marlboro was sold to a group consisting of Hess, the Rodgerses and Irving T. Schwartz. The Government contended that Schwartz, the purchaser of the largest interest, was a nominee for Kovens, but Kovens and Schwartz disputed the contention. Cory acted as attorney for the purchasers in connection with the acquisition (Tr. 4021-22, 9486-88, 9968-70).

Various steps were taken by the purchasers to keep their identities confidential (Tr. 4321-24). These included the designation of a third person, Eugene Casey, as president of the racetrack; filings with the Racing Commission in which Cory stated that he held the stock "as attorney" for unnamed principals; and the naming of nominees as shareholders of record (R. 890-96, 1721-22; Tr. 6369-6475). A disputed issue of fact was whether

the identities of the new purchasers were kept from Governor Mandel. The testimony of the witnesses for both sides was that Governor Mandel, the same as all other state officials, was not informed, but the prosecutor contended that circumstantial evidence indicated otherwise (Tr. 4456-58, 4520-25, 8302-05, 9495-98, 10004-08). It was undisputed, however, that the Racing Commission did not interest itself in the identities of the beneficial owners of racetrack stock, and that, until the passage of a strict disclosure statute in 1974, the use of nominees for such stock was a common and accepted practice in Maryland (R. 1342-50, 1616-17, 1858-64; Tr. 6200-10).

On January 12, 1972, when the legislature convened for its 1972 session, a number of Mandel's vetoes, including that of the bill for the transfer of the Hagerstown days, were overridden.[3] The direct evidence, including the testimony of the legislators who voted to override, was that Governor Mandel adhered to his original position on the racing transfer veto and that the override was contrary to his wishes.[4]

[3] Of nine vetoes of substance before the state Senate that day, six were overridden (R. 1009-12, 1040, 1185; Tr. 4728-38, 4894-95, 5270, 5347, 5769, 5789-90). The Governor's position was defeated in each such instance by a resounding margin (Tr. 4734-35).

[4] Most of the legislators who testified at the trial, whether for the Government or the defense, had voted repeatedly to override the Governor's vetoes on the opening day of the 1972 session (Tr. 5268, 5341, 5690). Nine of the state Senators who testified for the Government voted to override the veto of the racing transfer bill, and seven who testified for the defense voted similarly. Not one said that his vote to override was the result of any effort by the Governor or his staff. All sixteen explained that their votes were based entirely on the merits of the bill, or on its local nature, or because of the atmosphere of independence which surrounded the opening day of the 1972 session (R. 1029, 1173, 1241, 1254, 1260, 1378; Tr. 4772, 5265-72, 5342-47, 5630-36, 5691, 5793, 6340, 7354-55, 7696-97).

Against this substantial body of evidence, and as support for the contrary contention that Mandel must have procured the racing transfer override, the prosecution was allowed to offer hearsay statements, arising from casual conversations on the floor of the state Senate, in which various state senators were said to have speculated as to the Governor's views on the transfer bill. As the panel majority of the court of appeals later observed, in most instances the statements were attributed to "unidentified declarants;" the "most damaging hearsay statements were repeated by long-time political enemies of the Governor;" the statements related to "general feelings or beliefs;" and they "were made on and around the senate floor in the heat of political battle, where rumor, opinion and gossip abound" (Appendix hereto, pp. 50a-53a, *infra*). Finding that the testimony did not qualify under any recognized exception to the hearsay rule, the trial judge nevertheless admitted it under the residual exception of Rule 803(24), FRE, on the urging of the prosecution that the hearsay was "central" and "important to the core of the case."[5]

The second matter in which Governor Mandel was claimed to have benefited his co-defendants was a racing consolidation bill which was introduced later in the 1972 session. This proposal failed, but had it been enacted, all Maryland racing would have been consolidated at the state's most modern tracks, Laurel and Pimlico (R. 1018; Tr. 4595-4603). The year before, during the 1971 session, prior to the purchase of Marlboro, the legislature with Mandel's approval had enacted a statute requiring the Racing Commission to propose

[5] The trial judge, at first, declined to admit the hearsay, remarking to the prosecutors that, "I am permitting you to state conclusions about this matter, and why run the risk of bringing hearsay, double hearsay evidence in a case of this importance" (Tr. 4647). He later relented, admitting the evidence "under whatever rule it is" (Tr. 6235).

consolidation during the next session (Tr. 4751, 5353, 7764-65, 8041-44). The 1972 consolidation bill, sponsored by the Racing Commission, was the product of the earlier enactment (Tr. 5353, 7596-76). Since 1960, as a member of a study commission, and throughout his tenure as governor, Mandel had consistently sponsored and favored every consolidation proposal brought before the legislature (Tr. 7405-15, 7906-08, 7951-53, 8276-80; M.Exs. 1, 5). Mandel supported the 1972 proposal the same as he had supported all similar proposals for more than a decade.[6]

The two real estate ventures in which Mandel was alleged to have received interests as bribes were Ray's Point, Inc. and Security Investment Company (R. 53-7). There was no testimony that Mandel's participation in either venture was a bribe, and Kovens, allegedly the purchaser of the largest interest in Marlboro, had nothing to do with them. The Ray's Point venture involved a parcel of unimproved rural land. The undisputed evidence was that Mandel and a third person had located the property in the fall of 1971, before Marlboro was purchased, and that they formed an investment group. It was also shown that Hess and the Rodgerses were among the participants; that the property was acquired through a 100% mortgage; that Mandel received a 15% interest for his efforts in forming the group; and that, in March, 1973, when the property was sold and the corporation was liquidated, the net worth of Mandel's 15% was $165 (Tr. 1743-59, 1798-1801, 2054-60, 2080-83, 8161-70).

The other venture, Security Investment Company, owned a building leased to the Social Security Administration. Hess held a 9% interest in Security Investment as a member of a large investment group that included the Rodgerses (R. 574-76, 1824-25). In May, 1972, after the 1972 legislative session, Hess assigned 4% to Mandel. Mandel had participated with Hess in various real estate projects over the years, and the 4% in Security Investment was in exchange for Mandel's interest in a motel venture.[7] The assignment of the 4% was a private business matter between Hess and Mandel, and none of the other Petitioners was aware of it (R. 580, 1756-58; Tr. 2344-45, 2492-93). In April, 1973, in a further adjustment of their respective accounts, Hess and Mandel cancelled the assignment.[8]

[6] A study commission appointed by the current Governor, Harry Hughes, has just recently recommended consolidation of all Maryland racing at two racetracks, Pimlico and either Laurel or Bowie, *See*, Report of the Governor's Commission on Racing Reform (December 11, 1979), pp. 20-23.

Under the law of Maryland, a private citizen has never been required to reveal business relationships with public officials, and, until 1974, public officials in Maryland were not required to disclose personal business relationships with private citizens (R. 7819). By express constitutional fiat, moreover, the Governor and the other constitutionally elected officers were

[7] Before he was Governor, when he practiced law actively in Baltimore, Mandel had represented Hess in matters relating to Hess' real estate ventures (Tr. 8499-8500, 9398-9402). In 1968, in settlement of fees due, Hess granted Mandel an option to participate in a motel venture known as the Edwiness Venture (Tr. 8510-13, 8849, 9403-04; M. Ex. 256). In 1971, Mandel and Hess agreed that Mandel would not exercise the Edwiness option and that an interest in some other enterprise would be substituted for it. In 1972, after Hess was admitted to the Security Investment partnership, he assigned the 4% to Mandel in exchange for the Edwiness option (Tr. 8515-19, 8849, 9504-06).

[8] There was also evidence of miscellaneous gifts, loans and entertainment which were furnished to Governor Mandel by various of the other Petitioners, excluding Petitioner Cory. None of these transactions and occurrences was set forth in the indictment; they did not relate to any of the evidence central to the case; and many of them had occurred years before the purchase of Marlboro. *See, e.g.*, R. 666-86, 707-18, 739-48, 780-800, 817-18, 828-46, 1873-74).

exempted from the conflict-of-interest provisions of the state Code of Ethics (R. 186). See also, Report of the [Maryland] Committee to Submit a Code of Ethics (1969), p. 4. Nevertheless, of the twenty-two Maryland legislators who testified in this case, ten testified for the Government that they would have considered the Governor's business relationships relevant to their considerations of the veto override and the 1972 consolidation bill.[9] In contrast, the twelve who testified for the defense said that such information would have been irrelevant, or, at most, relevant solely in terms of its political ramifications.[10]

At the urging of the Government, the trial judge refused to give essential instructions relating to the theory of the defense, and, as a result, the charges submitted to the jury were significantly different from those made in the indictment. The most fundamental departure occurred with regard to the allegations of bribery.[11] The trial judge declined to instruct the jury, in connection with the mail fraud counts, that, to conclude that the Governor schemed to defraud the state of his loyal and faithful services, it was necessary to find that he had been bribed (R. 106, 119-27, 143, 155-57, 253, 257-60). Insofar as the mail fraud counts were based on concealment of the co-defendants' interests in Marlboro, moreover, the trial judge refused to instruct the jury that it was necessary to find that Mandel had actual knowledge that some of the co-defendants had purchased Marlboro and were owners of its stock (R. 253,

[9] Tr. 4606-4836, 4837-4895, 4996-5199, 5239-90, 5291-5399, 5399-5641, 5667-99, 5764-5829, 6307-63, 6363-80.

[10] Tr. 7310-46, 7346-7404, 7416-35, 7568-90, 7655-62, 7663-75, 7676-90, 7691-7726, 7744-7823, 7824-86, 7904-19, 8191-8205.

[11] Imploring the trial judge to omit any requirement of bribery in connection with the mail fraud counts, the chief prosecutor said that, "We are concerned about the fact that this jury should not be misled in believing that this is a bribery case."

259-60). In connection with the racketeering counts, the jury was told that, upon a finding of two acts of mail fraud, as defined by the court, the defendants could be convicted of racketeering as well as mail fraud, all without any need for finding bribery.[12]

Under the instructions given, the jury was allowed to find the Petitioners guilty of mail fraud and recketeering for failure of the Governor to adhere to a standardless notion of loyal and faithful services and for failure of all of the defendants to comply with an undefined concept of fair dealing (R. 177-79). Further aggravating the problem, the jury was also instructed that, notwithstanding the inapplicability of the state Code of Ethics to the conduct of the Governor, the jurors could nevertheless look to the Code "as a guide for determining the standard of conduct expected of public officials by the State of Maryland" and as an aid in determining the defendants' intent (R. 186).

After deliberating for a week, the jury reported that they were unable to come to "a unanimous decision as to the existence of a scheme to defraud" or to "a unanimous verdict on the guilt or innocence on any of the charges on any of the Defendants in this case" (R. 309-10). The trial judge thereupon delivered a supplementary instruction that the jurors should not hesitate to re-examine their views and that the importance of the case, as well as the time and expenditure involved in the trial, were relevant factors for them to consider

[12] Consistent with this charge, the chief prosecutor, in his summation, emphasized that the jury could find the defendants guilty without making any determination that Mandel had been bribed. "What I want to explain to you or emphasize to you," he argued, "is that the whole concept of bribery is relevant only in Counts 21 and 23 [the racketeering counts] and that even as to those two counts you, in fact, can convict and should under the law convict even if you don't find those two briberies, if you find any two of the 20 mail fraud violations" (R. 1989-90).

(R. 310-13; Tr. 11739-46). Six days later, after two jurors had fallen ill from the intense controversy that marked their deliberations, one requiring hospitalization and the other needing emergency medical care, the jury rendered the verdicts on which the judgments of conviction were entered.[13]

In their appeal to the Fourth Circuit, Petitioners maintained that the mail fraud charges, as submitted to the jury, were so lacking in definable standards as to amount to an over-extension of the mail fraud statute. If the indictment could be interpreted as allowing conviction on the basis of the instructions given, Petitioners contended, the charges should be dismissed as beyond the reach of 18 U.S.C. §1341. The panel majority held that the indictment was not vague and undefined but that error was committed by the trial judge in submitting to the jury a different case than that which was charged.

The panel majority concluded that the indictment charged a scheme cognizable under the mail fraud statute on either or both of two theories: (1) that the Governor had "either been bribed" or that "attempts had been made to bribe the Governor;" or (2) that false information as to the ownership of Marlboro was presented to the legislature or to the Racing Commission to induce them to take favorable action toward the racetrack (Appendix hereto, p. 42a, *infra*). Since the jury instructions had been seriously deficient as to both theories, however, in not requiring a finding of bribery or actual knowledge of the allegedly false information, the panel majority held that the convictions were improperly obtained (Appendix hereto, pp. 42a-45a, *infra*). The error was compounded, the majority held, by substituting for bribery and actual knowledge the

[13] *See*: Motion of Marvin Mandel for New Trial, Exs. B, C; Order Denying Request for Hearing Concerning Sick Juror, August 18, 1977.

standards of a Code of Ethics which was admittedly inapplicable to the conduct of the Governor (Appendix hereto, pp. 45a-48a, *infra*).

Since it was necessary to remand the case for a new trial, the panel majority also reviewed the Government's use of hearsay for "the central part of its case" (Appendix hereto, p. 48a *infra*). Reviewing carefully the volume and character of hearsay admitted, and assessing its prejudicial impact and unreliable nature, the majority held that it had been improperly admitted. "Evidence based on rumors and general discussions is the worst type of hearsay," the majority wrote, adding that, "Such testimony, especially from unidentified declarants, does not possess the requisite guarantees of trustworthiness to justify a new exception to the hearsay rule" (Appendix hereto, p. 52a, *infra*). Other errors in the admission of evidence were noted (Appendix hereto, pp. 53a-55a, *infra*), but, inasmuch as the case was being remanded for new trial, other substantial issues were not reached (Appendix hereto, p. 61a, *infra*).

After rehearing en banc, three members of the six-member court announced that, "The judgments of conviction are affirmed by an equally divided court," and that, "A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division" (Appendix hereto, p. 7a, *infra*). Petitioners' request for a further rehearing en banc, to cure the problems created by the 3-3 tie vote, was denied by a 4-4 tie vote.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SUBSTANTIAL AND RECURRING QUESTIONS WORTHY OF REVIEW BY THIS COURT, AND THAT REVIEW OUGHT NOT BE HINDERED OR DESTROYED BY THE FOURTH CIRCUIT'S UNREASONED ACTION IN "AFFIRMING THE CONVICTIONS BY AN EQUALLY DIVIDED COURT."

This petition for certiorari is necessarily directed to the order of the en banc Fourth Circuit dated July 20, 1979 (Appendix, p. 3a). That order is clear in one respect only. It clearly purports to affirm the judgments of conviction by an equally divided court, i.e., by a 3-3 vote of the qualified active Circuit Judges then available.

The petition for mandamus filed simultaneously herewith demonstrates the lack of judicial power in such an equal division to affirm the judgments of conviction in these circumstances. It becomes the function of this petition for certiorari to attempt to piece together the various questions properly raised by the Petitioners in their appeals to the Fourth Circuit which are worthy of review by this Court.

Petitioners have no illusions about the difficulties involved in attempting to reconstruct these questions out of the procedural and decisional chaos created by the action of equal division of the Fourth Circuit. It has often been said that an affirmance by an equally divided court settles nothing for the divided court. *See, Neil v. Biggers,* 409 U.S. 188, 192 (1972). Here, even the point upon which the court below divided equally is not clearly stated, it being referred to merely as "the claim of error in the charge to the jury." Reliance must perforce be had upon Judge Widener's dissenting opinion to discover which of the various claims of error in the instructions was the one on which the court divided.

Moreover, the July 20th order further indicates that a majority of the members of the six-judge en banc court "would affirm the judgments of conviction against all the contentions of the Appellants," except upon the point upon which there was equal division. Again, there is no identification of these contentions. Are they the other contentions raised in response to the limited questions posed in the Government's petition for rehearing? Or, is this a 4-2 ruling rejecting the various other issues raised by Petitioners on their original appeals, including those which the three-judge panel did not reach? All we have are the dissenting words of Judges Widener and Russell. They first noted that "there are a number of issues raised in this case which are not dealt with in the majority en banc opinion," and that, "Discussion of these issues was unnecessary in the majority panel opinion since a new trial was required in all events." See Appendix hereto, page 14a, *infra.* This led Judges Widener and Russell to question the "decision not to discuss any of the remaining issues raised on appeal, some of which may present possible grounds for reversal" (14a-15a, *infra*).

Petitioners have no alternative but to go forward, before this Court, with all questions that they believe worthy of this Court's consideration. They do so with full knowledge that they are asking this Court to perform appellate tasks that should have been performed in the first instance by the Fourth Circuit. The still viable and more fully articulated decision of the Fourth Circuit, dated January 11, 1979, should be given its proper effect through the requested mandamus. But whatever the procedural means, Petitioners must renew their request that their statutory right to a meaningful appellate review not be destroyed by the ambiguous and unenlightening en banc order of July 20, 1979.

By any definition, this is an important federal prosecution, important both to the Government and to

the individuals whose liberty is at stake. As a result of this prosecution, Maryland's elected governor was unable to fulfill the functions of his office for most of his second term. As Judge Murnaghan remarked in his dissenting statement of November 1 (Appendix hereto, p. 3a, *infra*): "This was no ordinary case. Its consequences on the entire political system of the State of Maryland are enormous. It cries out for a proper resolution, where such a resolution is possible."

Before the Fourth Circuit, the Government argued for a more definitive resolution of the issues, contending that: "[T]he importance of the legal issues is matched by the importance of the case itself . . . The case involves serious allegations of wrongdoing by the highest elected official of the State. The parties, the scores of witnesses, and the state of Maryland itself have endured nearly five years of turmoil and uncertainty." Government's Pet. for Rehearing, p. 29. The equal division below has done nothing to relieve that turmoil and uncertainty.

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT AS TO THE GOVERNMENT'S ALTERNATIVE THEORIES OF THE ALLEGED MAIL FRAUD HAS ACQUIRED EXTRAORDINARY SIGNIFICANCE AS THE ISSUE THAT CAUSED THE EN BANC COURT TO DIVIDE EQUALLY.

The en banc Fourth Circuit indicated in its July 20th order that its equal division related to "the claim of error in the charge to the jury." In their dissent, Judges Widener and Russell also stated that the equal division "related to the denial by the trial judge of requested instructions." (Appendix hereto, pp. 7a, 8a, *infra*).

The dissent by Judges Widener and Russell elaborated this point on which there was equal division. By reference to the discussion in the panel opinion that found reversible error in the denial of requested instructions (Appendix hereto, p. 8a, *infra*), these

Judges pinpointed the instructions that had been erroneously denied: (a) the refusal to give a bribery instruction as to the mail fraud counts; and (b) the failure to instruct as to Governor Mandel's knowledge of the financial interests of the co-defendants. The panel gave importance to those two refusals to instruct by relating them to the two alternative theories of the mail fraud as advanced by the Government. On one theory, the essence of the mail fraud counts was the alleged bribery of Governor Mandel — thus the refusal to instruct as to bribery under those counts was held reversible error.[14] On the alternative theory, the indictment could be construed as alleging that the scheme was to obtain money and property by means of false representations and concealment of material facts — thus the refusal to instruct as to the need to find that the Governor knew of his co-defendants' concealed financial interests was held reversible error.[15]

The keystone in any evaluation of the importance of the refusals to instruct as to bribery and knowledge is found in the fact that the en banc court was deeply and evenly divided on these matters. Three of the six participating judges believed that the jury in this

[14] The mail fraud counts alleged (see A. 52) that the Maryland citizens and agencies had been deprived of the faithful services of Governor Mandel "free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud." Judge Murray, in holding the indictment sufficient, found that the "essence" of the scheme set forth in the indictment was "to defraud the citizens and the State of Maryland by bribing the Governor to assist legislation which would be financially beneficial to the owners of Marlboro." *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976).

[15] The mail fraud counts also asserted (see A. 53) that the alleged scheme involved an effort to obtain money and property "by means of false and fraudulent pretense, representations, and promises, and the concealment of material facts, relating to the Marlboro Race Track," and other enterprises and "matters."

important prosecution could have been hopelessly confused by the failure of the trial judge to define the bribery portion of the mail fraud charges, and the failure to deal with Governor Mandel's lack of specific knowledge of his co-defendants' interests. The other three judges flatly disagreed with that assessment. Therein lies the reason and the need for the grant of certiorari. At each level of this prosecution — the indictment, the trial, and the appeal — additional significance and controversy have been added to the two refusals to instruct.

Moreover, the instruction issue that so deeply divided the en banc court was one that the Government claimed was important enough to warrant a rehearing en banc. Under Appellant Rule 35(a), such a rehearing is limited to those issues that have "exceptional importance," as well as those reflecting some internal conflict within the Circuit. Obviously, any question possessing an importance sufficient to justify the grant of an en banc rehearing and then causes an equal division among the en banc judges, cannot lose its "exceptional importance" when it comes before this Court for review.

As Judges Widener and Russell stated in their July 20th dissent (p. 12a *infra*), the en banc court's equally divided approval of the trial court's instructions in these regards has created a conflict with the established rule in other Circuits that a criminal defendant is entitled to an instruction on any theory of defense for which there is a foundation in the evidence. *See, e.g., United States v. Swallow,* 511 F.2d 415, 523 (10th Cir. 1975), cert den., 423 U.S. 845; *United States v. Noah,* 475 F.2d 688, 697 (9th Cir. 1973), cert den., 414 U.S. 1095; *United States v. Dana,* 457 F.2d 205, 208 (7th Cir. 1972); *United States v. Blair,* 456 F.2d 514, 520 (3d Cir. 1972); *United States v. Leach,* 427 F.2d 1107, 1112 (1st Cir. 1970), cert. den., 400 U.S. 829; *Blane v. United States,* 389 U.S. 835 (1967); *Perez v. United States,* 297 F.2d 12, 15-16 (5th Cir. 1961); *Apel v. United States,* 247 F.2d 277, 282 (8th Cir. 1957); *United States v. O'Connor,* 237 F.2d 466, 474, n.8 (2d Cir. 1956); *Tatum v. United States,* 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (1951).

The Government's adamant insistence that essential instructions not be given with respect to the mail fraud charges, and the trial court's consequent failure to grant them, amounts to a denial of the defendants' right to a fair trial and an abuse of the prosecutorial function. When the trial judge permitted the mail fraud charges to be decided on a basis different from "the essence" of the indictment, he deprived the Petitioners of their "substantial right to be tried only on charges presented in an indictment by a grand jury," and, "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment." *Stirone v. United States,* 361 U.S. 212, 217, 218-19 (1960). For a detailed analysis of the change in the Government's allegations in the course of the trial, see the July 20th dissent of Judges Widener and Russell, at pages 8a-12a of the Appendix hereto, *infra.*

III. THE FEDERAL MAIL FRAUD STATUTE HAS BEEN MISAPPLIED AND OVEREXTENDED IN THIS CASE, THEREBY CREATING AN UNFAIR TRIAL AS WELL AS CONFLICTS WITH OTHER CIRCUITS.

The grant of certiorari is not only appropriate but essential to determine if a grave injustice has been accorded these Petitioners by the en banc court's approval of the judgments of conviction. Within those judgments are embedded serious problems as to the proper application of the federal mail fraud statute to a scheme to defraud a sovereign State and its citizens of the faithful services of their Governor. And those judgments, untutored as they are by any definitive appellate consideration, appear to be in conflict with

the rulings of other Circuits that have addressed these important problems.

Since the racketeering counts are so totally dependent upon the viability of the mail fraud counts, any problems that may infect the judgments of conviction relative to mail fraud necessarily implicate the judgments of conviction under the racketeering counts. Thus any defects in the application of the mail fraud statute to the scheme here alleged bring into jeopardy the totality of the judgments of conviction so summarily affirmed by the en banc court. The due process and fair trial implications of such a result need no elaboration.

A. *The bribery aspect of the scheme*

As conceived by the indictment, the scheme was one to defraud the State of Maryland and its citizens of their right to the faithful and unbiased services of Governor Mandel, acting in his official capacity. The first problem in such public corruption prosecutions has been to define this public right to honest and faithful government for purposes of § 1341. Courts have generally found the § 1341 standard to be the equivalent of private business standards of "moral uprightness . . . fundamental honesty, fair play and right dealing in the general business life . . . of society." *See, e.g., Blachly v. United States,* 380 F.2d 665, 671 (5th Cir. 1967). Public officials, in other words, may be convicted under § 1341 if their actions may be said to involve a scheme to defraud state citizens of an intangible, federally created right to "honest and faithful government." *United States v. Brown,* 540 F.2d 364, 374 (8th Cir. 1976).

But most Circuits have recognized that § 1341, as applied to public officials, might well be unconstitutional and overly intrusive upon traditional state interests unless some more explicit standard of criminal

conduct is used to supplement the "moral uprightness" standard. Thus virtually every prosecution and conviction of public officials under § 1341 have identified the violation of the "moral uprightness" standard in terms of the official's involvement in extortion, bribery, kickbacks or violation of some other identifiable criminal, civil or common law duty. *See, e.g., United States v. Isaacs,* 493 F.2d 1124, 1170 (7th Cir. 1974), cert. den., 417 U.S. 976; *United States v. Barrett,* 505 F.2d 1091, 1104 (7th Cir. 1975); *United States v. Keane,* 522 F.2d 534, 547 (7th Cir. 1975); *United States v. Bush,* 522 F.2d 641, 646, 651 (7th Cir. 1975); *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976).

Indeed, the Fourth Circuit itself, in *United States v. Caldwell,* 544 F.2d 691, 694-95 (4th Cir. 1976), has accepted this general understanding that mail fraud prosecutions of public officials should in some manner reflect that the officials were bribed or that they otherwise acted "in violation of state law" before the conclusion can be drawn that the citizens of the state were deprived of their right to the officials' "fair and impartial execution of the [state] laws." 544 F.2d at 697.

This judicial insistence that some identifiable violation of a criminal, civil or common law duty be at the heart of a § 1341 prosecution of a public official found early expression in the instant prosecution. The indictment plainly charged that the State of Maryland and its citizens had been defrauded of their right to the faithful services ["moral uprightness"] of Governor Mandel "free from bribery . . ." A. 52. And the trial court early on determined that the "essence" of the § 1341 charge was a scheme that involved "bribing the Governor." *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976). Throughout the first trial and the retrial, the Government consistently asserted that bribery was indeed the heart of its case.

But at the end of the retrial, in recognition of the paucity of its proof of bribery, the Government changed its theory of the case. It persuaded the trial judge that, since bribery is not a statutory element of a scheme to defraud, it would be improper to include a bribery instruction in the mail fraud charge to the jury. The absence of a bribery instruction, however, gave the jury no standard to assess the federally created right to honest state government other than in terms of its own conception of the "moral uprightness" and "right dealing" of Governor Mandel's official activities.

The opinion of Judges Widener and Russell in dissent to the en banc affirmance of the judgments of conviction (Appendix hereto, pp. 8a-12a *infra*) recounts the Government's "complete flip-flop" on the appeal with respect to the absence of a bribery instruction. The essential point remains that the jury was not instructed that, to convict the petitioners of mail fraud, it must find that bribery had in fact occurred. Only with such an instruction could there be any assurance that the jury had properly concluded that the State of Maryland and its citizens had been deprived of the faithful services of Governor Mandel "free from bribery."

Without a bribery instruction, the jury was free to make its assessment of the faithfulness of Governor Mandel's activities in light of its own views of "moral uprightness, fundamental honesty, fair play and right dealing." Whatever Government counsel may now say,[16] the judgments of conviction were drained of all instructional assurance that they rest on something more meaningful than an *ad hoc* application of the amorphous "moral uprightness" rubric.

[16] It is axiomatic that Petitioners are entitled to have their convictions appraised not in terms of the prosecution's appellate arguments but in terms of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).

It follows that when the en banc Fourth Circuit purports to affirm the judgments of conviction, it purports to affirm judgments stripped of the one element — bribery — that would assure that § 1341 has been applied in this case in a manner consistent with § 1341 jurisprudence and with the due process demands of fair notice. The en banc affirmance of such judgments must be deemed in conflict with all the Circuit decisions, cited above, that have insisted that a § 1341 prosecution of a public official involve some discernible violation of a criminal, civil or common law duty.

This Court has never had occasion to address this problem of alleged mail fraud violations by public officials, which are so often coupled with identical allegations with respect to racketeering violations. This is the time and the case in which to make a definitive assessment of the application of § 1341 to public officials. Mail fraud prosecutions of such officials are increasing in numbers. See, Ruff, *Federal Prosecution of Local Corruption*, 65 Geo. L.J. 1171 (1977). But unless such prosecutions are carefully confined within the bounds of congressional intent and due process requirements, § 1341 can soon become a vehicle for undue federal intrusion into the affairs of state governments.

This very case carries with it the spectre of federal judges, federal prosecutors and federal juries sitting in unrestricted judgment of the "moral uprightness" of the activities of elected state officials. That is essentially a political judgment. And it is a judgment as to which the state officials can expect no fair warning as to criminal consequences.

B. *The non-disclosure aspect of the scheme*

As submitted to the jury at trial, the mail fraud charge was that the State of Maryland and its citizens had been additionally defrauded by virtue of the non-disclosure of the business interests of Governor Mandel. Non-disclosure, in other words, was deemed to give alternative or additional content to the vague mail fraud standard of "moral uprightness" in the conduct of public office.

But it is uncontested in this case that none of the specific acts of non-disclosure were rendered unlawful by any Maryland statute, regulation or rule. That absence of any state law violation places the non-disclosures in a vacuum. They simply become an unstructured element for the jury to assess as part of its unstructured application of the vague "moral uprightness" standard under § 1341. Such a submission to the jury exascerbates the problem of determining the extent to which the "moral uprightness" concept written into § 1341 must be based on discernible violations of state laws or common law duties.

Indeed, the en banc affirmance of the judgments of convictions constitutes a direct conflict with the interpretation of § 1341 adopted by the Eighth Circuit in *United States v. Rabbit*, 583 F.2d 1014, 1026 (8th Cir. 1978). In *Rabbit*, the court reversed a § 1341 conviction of a state legislator, based on non-disclosure of his business relationship with private individuals. The Eighth Circuit ruled that the legislator was under no affirmative duty to disclose his interest because "the government referred to no [state] standard of conduct applicable to legislators which clearly required disclosure of [the legislator's] interest in the [matter] . . ."

The en banc affirmance also conflicts in principle with this Court's dictum in *Parr v. United States*, 363 U.S. 370, 389 (1960). The Court there stated that

Congress enacted § 1341 so as to forbid and make criminal any use of the mails for the purpose of executing a scheme to defraud, "leaving generally the matter of what conduct may constitute such a scheme for determination under other laws." That dictum suggests that, if non-disclosure allegedly constitutes a part of the scheme, the non-disclosure must result from a violation of some requirement of disclosure "under other [state] laws."

These problems of non-disclosure, like that of bribery, warrant review and consideration by this Court.

IV. SERIOUS QUESTIONS ARE PRESENT AS TO WHETHER CONGRESS INTENDED TO APPLY THE "RACKETEERING" PROVISIONS AND SANCTIONS OF THE ORGANIZED CRIME CONTROL ACT TO THE CIRCUMSTANCES AND THE INDIVIDUALS HERE INVOLVED.

Substantial problems are generated by the affirmance of the judgments of conviction under Counts 21 and 24 of the indictment. Those counts alleged violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968.[17] Title IX of that Act is entitled "Racketeer Influenced and Corrupt Organizations" (RICO), and is currently one of the most frequently used federal weapons in the drive against white collar crime.

[17] Count 21 alleged that Governor Mandel alone had violated § 1962(b) of RICO in that he had acquired and maintained an interest in and control of Security Investment Company through a "pattern of racketeering activity." The "pattern" allegedly consisted of the 20 mail fraud violations charged in Counts 1 through 20, plus two violations of the Maryland bribery statute, Md. Code Ann., Art. 27, § 23.

Count 24 alleged that all the defendants other than Governor Mandel conducted the affairs of Marlboro Race Track through a "pattern of racketeering activity," in violation of § 1962(c) of RICO. The alleged "pattern" consisted of the 20 mail fraud violations charged in Counts 1 through 20. No claim was made that any violations of the Maryland bribery statute constituted any part of this "pattern".

The statutory problems that emerge in this case can be appreciated only after tracking the statutory provisions that lead to the labeling and punishing as "racketeers" many white collar defendants (such as these petitioners) who have no connection whatever with the Congressional or RICO concept of "racketeers."

RICO violations are clustered in § 1962, which essentially provides that "any person" who has maintained or conducted the affairs of an interstate enterprise through a "pattern of racketeering activity" is punishable as a "racketeer." A "pattern of racketeering activity" is defined in § 1961 as the commission of two or more chargeable or indictable offenses under state or federal law. In this case, the alleged "pattern" consisted of the federal mail fraud violations charged in the first twenty counts of the indictment. Thus, under the structure of RICO, a jury determination that the petitioners were guilty of two or more of the mail fraud counts automatically established a "pattern of racketeering activity" for § 1962 purposes.

There are two major questions resulting from the application of this statute to the petitioners:

(1) DID CONGRESS INTENT TO APPLY THE RICO "RACKETEER" PROVISIONS TO MAIL FRAUD VIOLATORS WHO ARE IN NO WAY CONNECTED WITH ORGANIZED CRIME?

This Court has yet to give a definitive construction to the RICO provisions in light of the legislative history and purpose of the Organized Crime Control Act of 1970, of which RICO is an integral part. The rather narrow and precise thrust of the Act would seem well summarized in Section 1 of the Act (see Note to 18 U.S.C.A. § 1961), which states that the purpose of the Act is to deal with and eradicate "the unlawful activities of those engaged in organized crime." So

plain is this purpose that this Court, in dealing with another provision of the Act in *Iannelli v. United States*, 420 U.S. 770, 786 (1975), observed that the content of the entire Organized Crime Control Act "reflects the dedication with which the Legislature pursued this purpose [of eradicating organized criminal activities]".

As stated recently by the Sixth Circuit in *United States v. Sutton*, 605 F.2d 260, 268 (6th Cir. 1979), the "legislative history conclusively demonstrates that RICO was enacted in response to the growing subversion of our society's legitimate institutions of business and labor by organized crime, a relatively recent development that Congress deemed a significantly more dangerous threat to the nation's social and economic stability than the age-old problem of crime for crime's sake." *See also Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

This statutory issue becomes one of interpreting the words "any person" — i.e., "any person" who violates § 1962 — in light of this legislative history and purpose. Are those words to be read literally and without regard to that history, so as to apply the RICO sanctions to "any person" who commits two or more violations of the mail fraud statute? *Cf. United States v. Culbert*, 435 U.S. 371 (1978), which held that the legislative history of the Hobbs Act did not justify reading the broad statutory language as applicable only to those engaged in "racketeering." Or should those words "any person" be subjected to the alternative and more familiar rule of statutory construction, "that a thing may be within the letter of the statute, and yet not within its spirit, nor within the intention of its makers"? *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). *See also United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

Only this Court can determine which rule is to be applied in construing the "any person" language in RICO. Are those words to be read literally, or in light of the Congressional intent to deal only with those persons who are members of organized crime syndicates in America?

(2) DID CONGRESS INTEND TO IMPOSE MULTIPLE PUNISHMENTS FOR SIMULTANEOUS VIOLATIONS OF THE FEDERAL MAIL FRAUD STATUTE AND THE RICO ANTI-RACKETEERING STATUTE?

The fact that violations of RICO depend so heavily in this case upon a "pattern" of mail fraud violations raises an important and unresolved question whether Congress intended to impose multiple punishments for these two interrelated offenses. This question becomes particularly acute if the "any person" language in RICO is read literally so as to apply to any person who commits a "pattern" of two or more mail fraud violations, regardless of whether he is a member of an organized crime group.

This problem can be answered by use of one or both analyses that have been established by this Court. Under the test enunciated in *Blockburger v. United States,* 284 U.S. 299, 304 (1932), Congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction depends on "whether each [statutory] provision requires proof of a fact which the other does not." Under that test, it can be argued that a RICO violation premised on a series of mail fraud violations requires no proof of any essential fact that need not be proved with respect to a mail fraud violation.[18]

[18] The fact that a RICO violation must involve an interstate enterprise does not distinguish the proof required of a mail fraud violation, particularly where as here the alleged scheme to defraud by mail involves interstate enterprises. In any event, the interstate nature of the enterprise is generally inconsequential to proof of a RICO violation.

The same result is possible under the more sophisticated test applied in *Iannelli* and in *Simpson v. United States,* 435 U.S. 6, 12-13 (1978). The test in those cases is whether Congress exhibited an awareness of "significant differences in characteristics and consequences of the [two] kinds of offenses" that would reflect distinctive federal interests and concerns. Under the *Iannelli-Simpson* standard, it is difficult to perceive any discreet differences in the federal interests and concerns as between (a) punishing white collar businessmen, who are not members of "organized crime," for using the mails in execution of a single scheme to defraud, and (b) punishing white collar businessmen, who are not members of "organized crime," for having engaged in a "pattern of racketeering activity" in the form of two or more uses of the mail in execution of a single scheme to defraud.

The confluence of mail fraud and racketeering charges, which is so frequent in RICO prosecutions, makes it increasingly important that this problem of multiple punishments be addressed and resolved by this Court.

V. THE REVIVAL OF "FORFEITURE OF ESTATE," AS MANDATORY PUNISHMENT FOR VIOLATION OF TITLE IX OF THE ORGANIZED CRIME CONTROL ACT, RAISES PROFOUND AND LONG-FORGOTTEN CONSTITUTIONAL QUESTIONS.

Pursuant to the mandate in § 1963 of RICO, Title IX of the Organized Crime Control Act, the District Court ordered that the five Petitioners found guilty of violating Count 24 forfeit to the United States all their interests in the Marlboro racetrack enterprise.[19] Section

[19] Count 24 alleged that the five defendants other than Governor Mandel had conducted and participated in the conduct of the Marlboro Race Track through a "pattern of racketeering activity." The racetrack enterprise was not alleged to be an illegal activity, nor was it alleged to be the means for effectuating the "pattern" of two or more mail fraud violations.

1963, entitled "Criminal penalties," condemns anyone who has conducted an enterprise in violation of § 1962 to suffer triple punishment: (1) he shall be fined not more than $25,000; and/or (2) he shall be imprisoned not more than 20 years; and (3) he shall forfeit to the United States any interest in any enterprise he has conducted in violation of § 1962.

Precisely because § 1963 involves criminal forfeiture of property, rather than the *in rem* forfeiture of offending objects used in violation of some federal law, the statute gives rise to "serious constitutional questions." *Calero-Toledo v. Pearson Yacht Leasing Co.* 416 U.S. 663, 689 (1974). The legislative history of § 1963 confirms that forfeiture was here conceived of as the third of three possible punishments, the others being fine and imprisonment, for the convicted individual. *See* H. Rep. No. 911549, 91st Cong., 2d Sess.; S. Rep. No. 91-617, 91st Cong., 1st Sess.; 116 Cong. Rec. 35205, 35208. *And see United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), which distinguishes a § 1963 forfeiture from an *in rem* forfeiture.

As the District Court below recognized, *United States v. Mandel,* 408 F. Supp. 679, 682 (D. Md. 1976), the forfeiture provisions of § 1963 "resurrected the device of criminal forfeiture, which had been abolished along with corruption of blood by the First Congress in 1790." That is a reference to § 24 of the Act of April 30, 1790, 1 Stat. 112, 117, the first federal criminal code, which stated:

> Sec. 24. *Provided always, and be it enacted,* That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate.

That early outlawing of corruption of blood and forfeiture of estate, as punishment for violation of any federal criminal statute, remains a part of the federal criminal code to this day. See 18 U.S.C. § 3563, derived from Rev. Stat. § 5326 (1874).

The constitutional problems implicit in any criminal forfeiture are a reflection of the historic common law revulsion against this form of punishment. Beginning with the Magna Carta, increasing restrictions were placed on the use of forfeiture of estate in England.[20] By the time of the adoption of the Constitution, criminal forfeiture "was deemed repugnant to our ideas of justice and was not included as part of the common law of this country." 5 Thompson, Real Property § 2514, p. 404 (1957).

The common law outlawing of criminal forfeiture undoubtedly accounts for the quick adoption by Congress of the 1790 statute. And the adoption of the statute, which was contemporaneous with the adoption of the Constitution, reflected what the legislators deemed to be the constitutional rule, forbidding such forfeitures save in one limited instance. The Framers had written into Article III, Section 3, a provision that permitted forfeiture of estate in a limited situation only, i.e., forfeiture of a convicted traitor's life estate. All other forms of forfeiture of estate resulting from a conviction for treason thereby "has been constitutionally proscribed." *Calero-Toledo v. Pearson Yacht Leasing Co., supra,* 416 U.S. at 683. See also *Wallack v. VanRiswick,* 92 U.S. 202 (1876).

The constitutional issues generated by § 1963, read against this historical and constitutional background, may be stated as follows:

(1) Does Article III, Section 3, which permits only the forfeiture of life estates of convicted traitors, constitute

[20] *See* 3 Holdsworth, History of English Law 68-71 (3d ed. 1927); 1 Pollack & Maitland, History of English Law 351 (2d ed. 1909). A short summary of this common law development is contained in the *Calero-Toledo* opinion, 416 U.S. at 682-683.

a constitutional prohibition of all other forms of forfeiture of estate? It would seem incongruous that the Framers would proscribe criminal forfeiture of other than life estates of convicted traitors while permitting criminal forfeiture of all kinds of estates of those convicted of lesser federal offenses. And the contemporaneous adoption of the 1790 statute would appear to be an implementation of the broad outlawing of criminal forfeiture implicit in Article III, Section 3.

(2) Does the Due Process Clause of the Fifth Amendment proscribe criminal forfeiture of property that has not been actually used or involved in any criminal activity? *See Platt v. United States*, 163 F.2d 165 (10th Cir. 1947); *United States v. One 1974 Cadillac Eldorado*, 407 F. Supp. 1115 (S.D.N.Y. 1975). Forfeiture of such property may be considered an undue penalty not only for historic common law reasons but because other civil and less drastic penal remedies are available, as § 1963 provides. *See also McKeehan v. United States*, 438 F.2d 739, 742-745 (6th Cir. 1971).

(3) Alternatively, does the historic common law revulsion against forfeiture of estate, supplemented by the forfeiture provisions in Article III, Section 3, make the criminal forfeiture of property here decreed a "cruel and unusual punishment" within the meaning of the Eighth Amendment? If the Eighth Amendment truly draws its meaning "from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), forfeiture of estate must be deemed "unusual" if not "cruel."

(4) Is the singling out of those convicted of violating § 1962 of RICO for purposes of imposing the punishment of criminal forfeiture consistent with the equal protection concepts implicit in the Due Process Clause of the Fifth Amendment?

These are constitutional questions of national importance. Definitive answers are necessary to determine if the § 1963 forfeiture provisions may validly be applied in this and in all future RICO prosecutions.

VI. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 803(24) OF THE FEDERAL RULES OF EVIDENCE.

The trial judge permitted the Government to establish what the panel opinion described as the "central part of its case" (Appendix hereto, p. 48a) through hearsay. Specifically, the Government alleged that Mandel brought about the override of his own veto of a bill which would have given Marlboro additional racing days, and thereby greatly increased Marlboro's profitability.

As its proof of this contention, the Government introduced testimony of several Maryland state senators who were present during the lobbying and voting on this bill. The nature of the hearsay testimony was described by the panel opinion of the Fourth Circuit as consisting of statements "by unidentified declarants, statements relating to the general discussion among the senators, statements concerning discussions with other senators and testimony by one senator relating the feeling of other senators." 591 F.2d at 1368. This testimony was objected to as hearsay but was admitted under Rule 803(24), Federal Rules of Evidence, even though the Government never provided the Petitioners with the names and addresses of most of the declarants whose statements were testified to by the witnesses.

The panel majority held that this hearsay was inadmissable because of the lack of notice and because the hearsay did not meet the criteria of Rule 803(24). With respect to the notice requirement, the panel opinion stated that Rule 803(24) is "not to be construed

broadly . . . and . . . we see no reason to depart from its plain requirements." Thus when the judgments of convictions were affirmed by an equally divided en banc court, the Fourth Circuit held in effect that the hearsay was admissible even without notice of the hearsay and the identity of the declarants as required by Rule 803(24).

Such a holding conflicts directly with that of the Second Circuit in *United States v. Oates*, 560 F.2d 45, 73 n.30 (2d Cir. 1977) ("there is absolutely no doubt that Congress intended the requirement of advance notice to be rigidly enforced"). The holding that the notice may be dispensed with also conflicts in principle with decisions in the Fifth and Eighth Circuits. *See e.g., United States v. Davis*, 571 F.2d 1354, 1360, n.11 (5th Cir. 1978) (". . . government made no attempt to invoke the . . . [803(24)] . . . exception by giving the defense the required advance notice of the hearsay evidence to be offered at trial"); *United States v. Lyon*, 567 F.2d 777, 784 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978) (pretrial notice may be dispensed with when other procedures, such as a continuance after notice gives opportunity for accomplishing the Congressional purposes). *See also, United States v. Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978) and *United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978). There is no case, except this one, in which a Circuit has approved dispensing with the notice requirement altogether.

Aside from the conflict as to notice requirement, the decision to affirm the convictions in effect extends Rule 803(24) far beyond any of its previous applications. The disputed testimony was characterized by the panel as follows:

> "First, the senators who testified all say that someone else said that Governor Mandel did not care whether his veto was overridden. No senator seems to have testified that Governor Mandel told him that the Governor did not care. Important also is the whole setting from which this testimony is drawn. We are dealing with a purely legislative political scene. Some of the most damaging hearsay statements were repeated by long-time political enemies of the Governor. Further, the statements were made on and around the senate floor in the heat of political battle, where rumors, opinion and gossip abound. We are not dealing with an objectively observable factual event. We are dealing with circumstantial proof of the position a governor took on two pieces of legislation. Evidence based on rumors and general discussions is the worst type of hearsay." App., pp. 51a-52a.

Thus, the en banc decision which approved the use of such hearsay demonstrated a liberality of interpretation of Rule 803(24) which is at odds with the Congressional declaration that this exception ". . . be used very rarely and only in exceptional circumstances . . ." and that it not be employed as a "broad license for trial judges to admit hearsay" or as a means for bringing about "major judicial revisions of the hearsay rule." Rule 803(24), Conference Report, 28 U.S.C.A. Historical Note.

Other Circuits, sensitive to the limited role contemplated by Congress for Rule 803(24), and acutely sensitive to the Sixth Amendment confrontation problems found by unduly expanding Rule 803(24) in criminal cases, have refused to construe or apply it broadly. *E.g., United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) ("Yet tight reins must be held to ensure that this provision does not emasculate our well-developed body of law . . ."); *See also, United States v. Bailey*, 581 F.2d 341, 349 (3rd Cir. 1978); *United States v. Ruffin*, supra; *United States v. Gonzolez*, 559 F.2d 1271 (5th Cir. 1977).

The decision below also raises important Sixth Amendment questions about the scope to be given Rule 803(24) in criminal cases. Although they are not co-extensive, the Confrontation Clause and the hearsay rule "stem from the same roots," *Dutton v. Evan,* 400 U.S. 74, 86 (1970). Despite the Confrontation Clause inhibitions on freely permitting hearsay evidence in criminal cases, some courts, and most particularly the Fourth Circuit, have relied on the new Federal Rules of Evidence to extend the permissible use of hearsay in criminal cases "to new and unwarranted lengths," 4 Weinstein Evidence, ¶ 804(b)(5), p. 143 (1978 Supp.).

The conflict among the Circuits as to the proper use of Rule 803(24) in criminal cases is sure to recur until resolved by this Court.

VII THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AS TO THE PROPRIETY OF GIVING THE ALLEN CHARGE TO A DEADLOCKED JURY.

On the evening of the seventh day of deliberations, the jurors reported that they were deadlocked on all the charges. The following morning, the trial judge delivered a modified version of the so-called *Allen* charge, a supplemental instruction to the jury designed to break that deadlock. He told the jurors, in part, that:

> "For the parties that are involved in this law suit, the Government and the Defendants, this case is an important one and its presentation to you has involved expense and expenditure of time by both the Government and the Defendants.
>
> Now, Mister Foreman and members of the Jury, please retire and further deliberate."

Six days after the delivery of this charge, the jury rendered their verdicts of guilt.

This Court has not addressed the propriety of the *Allen* or "dynamite" charge since its birth in *Allen v. United States,* 164 U.S. 492 (1896). The Circuits are in total conflict over use of the *Allen* charge, with three Circuits disapproving its use in any form. *See, United States v. Fioravanti,* 412 F.2d 407, 414-420 (3rd Cir. 1969), cert. den. 396 U.S. 837 (1969); *United States v. Brown,* 411 F.2d 930 (7th Cir. 1969); *United States v. Thomas,* 449 F.2d 1177 (D.C. Cir. 1971).

Most commentators and at least twenty-three state courts have disapproved the use of any form of the *Allen* charge.[21] Indeed, the Judicial Conference of the United States has recommended that it no longer be given in federal courts. See Supplement to Report of the Committee on the Operation of the Jury System, Judicial Conference of the United States 2 (1969).

Whether the *Allen* charge be disapproved altogether or whether it be retained in some form or other, the conflicts among the Circuits demonstrate the need for guidance from this Court.

[21] California is the latest state to outlaw the use of the *Allen* charge in its criminal courts. See, *People v. Gainer,* 139 Cal. Rptr. 861, 868-70, 566 P.2d 997, 1004-6 (1977). And see A.B.A. Project on Minimum Standards for Criminal Justice: Trial by Jury (Tentative Draft, May 1968) § 5.4, pp. 145-56; Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L. Rev. 296 (1972).

CONCLUSION

For these various reasons, a Writ of Certiorari should issue to review the judgment and order of the Court of Appeals for the Fourth Circuit affirming the judgments of conviction by an equally divided vote.

Respectfully submitted,

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APPENDIX

ORDER
(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

Upon consideration of the defendants' petition for another rehearing before the *en banc* court and the response of the United States, each of the judges in regular active service who is not disqualified having been polled, and it appearing that fewer than a majority of them have voted for it,

IT IS NOW ORDERED that the petition for another rehearing *en banc* before the enlarged court be, and it hereby is, denied.

For The Court:

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

October 30, 1979.

STATEMENT WITH RESPECT TO DENIAL OF FURTHER HEARING

(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

MURNAGHAN, Circuit Judge:

This statement is not lightly made. It appears only after reflection, and despite considerations which would normally preclude its seeing the light of day. First, one customarily does not announce a dissent from court action which is taken by vote and without opinion. Second, my past tangential contact with this case while a practicing lawyer would, in ordinary circumstances, dictate that I should recuse myself to avoid the appearance of even the slightest possible bias. Third, close association with the other members of this Court, short though it has been, has already thoroughly confirmed my earlier impression of the dedication, skill, compassion and concern for the Court as an institution of each of the members. The fact that four of my colleagues disagree with me is strong indication that my views may be wrong. Those considerations have not deterred me only because of a strange certainty, transcending the ordinary confidence one has in one's

convictions, that the Court's failure to decide this case constitutes a serious injustice.

It is nearly as important that cases be decided, and the decisions be accorded finality, as it is that they be disposed of absolutely correctly. Courts have, as a consequence, adopted a rule of necessity that an evenly divided appellate court, although it cannot render a decision, affirms the judgment. The unsatisfactory nature of such a decisionless result is reflected, however, in the rule that judgments of equally divided courts are not accorded precedential value. The rule of necessity has, however, no scope for application here. The even division which would normally bring the rule into play is not present when the even division coincides with an expansion of the court's membership. Judge Sprouse and I had joined the Court by the time it considered and acted on the petition for further rehearing.

So I regret the denial of that petition, the granting of which would avoid a situation so frustrating to defendants who have made arguments sufficient to persuade three members of the Court (that is one-half of those who participated in rehearing) that reversal and a new trial are required, if justice is to be accomplished. The defendants and the public generally, in whose service the courts operate, are entitled to a decision of this Court, whether it leads to reversal and a new trial, or whether, through affirmance, it gives requisite certainty and finality to the convictions. This was no ordinary case. Its consequences on the entire political system of the State of Maryland are enormous. It cries out for a proper resolution, where such a resolution is possible.

It would, of course, avail nothing, if yet another rehearing were to result only in a new deadlock. Since an even number of judges has been added to the Court, the danger of a fresh deadlock seems at first a large one, especially in light of the closeness of the issues, a closeness which is evidenced by the splits in both the

panel and the *en banc* court. As things are situated, however, another even division could not occur because any reargument of this case would be heard by an odd number of judges.

Enabling a court to reach a decision is not sufficient reason, standing alone, for a judge to recuse himself or herself. If it were, then, since all judges would be equally subject to the duty to recuse, evenly divided courts would effectively decide cases by lot, or some other arbitrary process, as they selected one of their members for recusal. Nor is preserving the decision making ability of a court sufficient reason for judges to fail to fulfill an otherwise clear obligation to disqualify themselves. But when grounds for a judge's recusal exist, but are ones related to appearances rather than actualities, impact on the court's decision making ability is a factor which the judge should take into account in deciding whether or not to participate. Another rule of necessity is then at work. The appearance of justice suffers far greater damage from a court's unnecessary inability to reach a decision than it does from the participation of a member of the court for whom there are palpable but far-fetched possibilities of bias. Since the reasons why I might recuse myself are of such a tenuous and speculative nature,[1] they would be outweighed by the importance of the court's being able to reach a decision. The court would thus be assured that, whether or not Judge Sprouse had to recuse himself, an odd number of members would participate in any rehearing of this case *en banc*. If he did not recuse himself, I would. If he did recuse himself, I would sit.

For these reasons, I feel compelled respectfully to express my dissent from the decision not to hold a further *en banc* rehearing. To the extent necessary to

[1] While in private practice, I represented two clients, on whose behalf I obtained intervention at the trial level, to contest rulings on the availability of news items emanating from the case, in one instance, and to resist an attempted confiscation of property by the Government, in the other.

permit that expression, I refrain from disqualifying myself.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent from the failure of the court to grant further *en banc* consideration in this case for the reasons expressed in my two opinions previously filed.

In addition, Judge Murnaghan's conditional disqualification now makes it certain that the case can be heard by an uneven number of judges. We know that on one important issue the court was divided 3 to 3, so a rehearing would have to result in a majority vote, one way or the other.

Especially in a criminal case in which people are going to jail by the vote of an evenly divided court, I have more reservations than I can overcome about sending them there without the vote of a majority when the means for getting a majority one way or the other is readily available to the court. I think the court as an institution suffers by our action, for I am not at all sure that we serve properly the appearance of justice when it is within our command so to do.

I am authorized to state that Judge Russell joins me in this opinion.

JUDGMENT
(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal from the United States District Court
for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

In consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II,
Clerk.

ORDER
(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

PER CURIAM:

The judgments of conviction are affirmed by an equally divided court.

A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

Affirmed.

DISSENTING OPINIONS

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for all of the reasons discussed in the majority opinion of the panel. *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), and would add the following additional comments.

I

The point of difference on which the en banc court is evenly divided relates to the denial by the trial judge of requested instructions. As indicated in the panel opinion, I would have reversed because of what I consider error in failing to give a bribery instruction in connection with the mail fraud counts of the indictment, and also for failure to give an instruction concerning Governor Mandel's knowledge of other defendants' financial interests. Without deemphasizing the latter, I think that affirming despite the lack of a bribery instruction for the mail fraud counts is so far from settled precedent that the reasoning should be stated in the opinion of the court. On that account, I state my reasons for considering such denial reversible error.

The mail fraud counts of the indictment had for a substantive basis a charge of bribery. However carefully one may comb the record, one can unearth no basis for wrongdoing by *all* the defendants,[1] which would be violative of the mail fraud statute, other than the charge of the acceptance on the part of defendant Mandel and the giving by the other defendants of a

[1] As the panel opinion pointed out, there were two bases shown by the evidence on which the prosecution for mail fraud in this case could have been pursued: bribery and concealment or misrepresentation of material information. However, evidence of Governor Mandel's connection with the alleged concealment or misrepresentation scheme was tenuous at best.

bribe or bribes. It is clear that such bribery was an essential element of the crime stated in the mail fraud counts of the indictment.[2]

Such was the construction given the indictment at the first hearing before Judge Murray, when one of the issues was a construction of the charges in the indictment. Judge Murray's ruling on this point was clear:

> "While the factual allegations in the indictment make the scheme appear to be a complex and subtle one, the thrust of the charges is simple. In essence, the indictment charges that the defendants devised a scheme to defraud the citizens and the state of Maryland by *bribing* the Governor to assist legislation which would be financially beneficial to the owners of Marlboro. . . ." *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976) (Emphasis added).

And that ruling accorded with the position taken by the government itself at the hearing.

At the first trial, the government asserted that bribery was at the heart of its mail fraud prosecution. Thus, counsel for the government at that trial stated to the jury:

> "Ask yourselves the question, as the evidence comes in, did the benefits that these men were giving to Marvin Mandel really have nothing to do with the benefits that they wanted to get out of the State Government and that to a substantial extent they were getting out of the State Government because that is the question *ultimately* that you are going to have to be deciding." (Emphasis added)

And throughout and until the end of the second trial, although the government may have begun to shift its

[2] Paragraph 27 of count 1 of the indictment alleged that "*Marvin Mandel* would and did . . . *in return for* financial and other benefits . . . act with intent to aid and assist certain legislation and legislative matters financially beneficial to the owners of Marlboro Race Track" (emphasis added). I think this is an accusation of bribery, pure and simple.

position with regard to bribery in connection with the mail fraud counts of the indictment, it continued to emphasize the importance of bribery in connection with those counts by introducing a mass of evidence on the alleged flow of benefits to Governor Mandel from the other defendants in return for official preference, without limiting such evidence to the racketeering counts of the indictment. The pervasive influence of bribery on the whole case is shown by the charge of the trial court to the jury with respect to the mail fraud counts, when, although it had just refused the bribery instruction of the defendants with respect to the mail fraud counts, in stating the charge against the defendants, it related the charge that Governor Mandel had not performed his office "free from bribery." The government at that time did not disclaim the bribery charge, as in fact it should have as a matter of common fairness if indeed it had abandoned the charge. Rather, it stayed silent when it had a duty to speak, and thus had its cake and ate it too.

Despite all this background, the government strenuously objected to any bribery instruction in connection with the mail fraud counts, as requested by the defendants at the conclusion of the testimony. Contrary to the position taken by it essentially at all times prior, the government argued that bribery was not an element of the mail fraud charges and that it was improper to include a bribery instruction in connection with the mail fraud counts. The trial judge accepted this argument and denied the requested instruction.

Even in argument to the jury, counsel for the government argued that bribery was not relevant to the mail fraud counts. They did this on the basis of the trial judge's ruling denying defendants' requested instruction.

On this appeal, however, the government has made a complete flip-flop. It now concedes — contrary to its argument to the trial judge at trial, not to mention to the jury — that bribery is included in the charge under

the mail fraud counts. But, contrary to its position at trial when it induced the trial judge to deny the defendants' request for a bribery instruction, it argues on this appeal that there was no error in the denial of an instruction on bribery under the mail fraud counts because:

(a) The trial judge did define bribery in connection with the racketeering counts and this was sufficient (1) to tell the jury what bribery was and (2) to tell the jury that bribery was included in the mail fraud counts (even though the trial judge specifically refused to so instruct the jury at the instance of the Government itself); and

(b) The trial judge did tell the jury, in summarizing the positions of the parties, that the defendants denied bribery.

This argument was accepted by those of my brothers who would affirm the judgment.

I cannot accept the argument. The government cannot blow hot and cold at the same time. It cannot argue that bribery is not involved in the mail fraud counts at trial and secure a ruling to that effect from the trial judge in connection with the jury instructions and use that ruling as a basis for the argument to the jury that the "whole concept of bribery is relevant only in Counts 21 and 23" (the racketeering counts), and then on appeal shift completely its position and contend that an instruction on bribery was to be treated as having been given, even though such an instruction was not only not included in the instruction on the mail fraud counts but had been specifically ruled to be improper. I cannot agree to such sophistry in a case where a defendant's right to a fair trial is involved.

The government and the trial judge agreed that bribery was an element in the crime charged in the racketeering counts. For that reason, a bribery instruction was given in connection with those counts. Neither the government nor the trial judge thought it sufficient

to omit such an instruction simply because the trial judge had stated the conflicting positions of the parties. But when the trial court gave its instructions on the mail fraud counts, it *purposely* omitted any instruction on bribery. Would not a jury be expected to notice the contrast between the instructions on the mail fraud and racketeering counts? Would it not be reasonable for the jury to assume under these circumstances that bribery was in no way related to the mail fraud counts? And would not this be especially so in view of the argument made by the government counsel, fresh in the minds of the jury, that bribery was irrelevant to the mail fraud counts?

This is an involved case. The prosecution rests on fragmented circumstances, many of the more essential ones being no more than mere rumor and legislative corridor gossip. In such a case, is not a defendant entitled to precise instructions? What was done here was, however, more likely to confuse and mislead than to provide clear guidance for the jury. And that should entitle the defendants to a new trial. The error is not insubstantial; it is fundamental.

I further note that it was not explicitly noted in the panel opinion that a criminal defendant is entitled to an instruction on any theory of defense for which there is a foundation in the evidence, and that a refusal to so instruct is reversible error. Because that principle is so universally recognized and accepted, I should have believed it required no mention or citation. However, since the affirmance of the defendants' convictions must reject this time honored principle, I should point out that every circuit, including this court, has embraced the principle that a criminal defendant is *entitled* to an instruction on any theory of defense for which there is a foundation in the evidence. See, e.g., *United States v. Swallou*, 511 F.2d 415, 523 (10th Cir. 1975), cert. den., 423 U.S. 845; *United States v. Mitchell*, 495 F.2d 285, 287-88 (4th Cir. 1974); *United States v. Noah*, 475 F.2d 688, 697 (9th Cir. 1973), cert. den., 414

U.S. 1095; *United States v. Dana*, 457 F.2d 205, 208 (7th Cir. 1972); *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972); *United States v. Leach*, 427 F.2d 1107, 1112 (1st Cir. 1970), cert. den., 400 U.S. 829; *United States v. Blane*, 375 F.2d 249, 252 (6th Cir. 1967), cert. den., 389 U.S. 835; *Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir. 1961); *Apel v. United States*, 247 F.2d 277, 282 (8th Cir. 1957); *United States v. O'Connor*, 237 F.2d 466, 474, n.8 (2d Cir. 1956); *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (D.C. Cir. 1951). The district court's refusal to give the substance of defendants' requested instructions on bribery and knowledge in connection with the mail fraud counts of the indictment clearly violated this principle.

The additional remarks I have made as to the sufficiency of the jury instructions should be read in light of the fact that the panel opinion carried the mail fraud statute near its outer limits, and some cases may arguably indicate beyond. See *Hammerschmidt v. United States*, 265 U.S. 182 (1924). Especially in view of that, it would have been far preferable for the district court to have charged the jury on the only two theories upon which a conviction could have been sustained, concealment or misrepresentation of facts and bribery. This, it did not do, and, assuming that is not reversible, it went further and rather than charge the jury with the law as it applied to the case, it charged the jury as to the contentions of the parties and even refused the defendants' proffered charges, as this dissent and the panel opinion note.

Accordingly, I am unshaken in my belief that the jury was inadequately and prejudicially charged in this case.

II

With respect to the hearsay issue, I add only the following quote from *Kotteakos v. United States*, 328 U.S. 750, 761 (1945):

"What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

"Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler v. United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer full legal status upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."

The hearsay and double hearsay evidence relating to comments allegedly made on the floor of the Maryland Senate, which was the only direct evidence of Governor Mandel's feelings on the veto override, fall precisely within the categories of "gossip, rumor, unfounded report, second, third, or further hand stories," *Kotteakos* decries. They simply do not possess the requisite guarantees of trustworthiness required by Federal Rule of Evidence 802(24).

III

Finally, I note that there are a number of issues raised in this case which are not dealt with in the majority en banc opinion. Discussion of these issues was unnecessary in the majority panel opinion since a new trial was required in all events.

Now, a majority of the court affirms the convictions on all grounds except the jury instructions, on which point the court is evenly divided. I question its decision not to discuss any of the remaining issues raised on

appeal, some of which may present possible grounds for reversal.

For the reasons stated above and in the panel opinion, I respectfully dissent.

I am authorized by Judge Russell to state that he joins in this opinion.

JUDGMENT
(Filed January 11, 1979)
United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal From the United States District Court for the District of Maryland.

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of acquittal on Count 23 of the indictment are affirmed. The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk.

OPINION
(Filed January 11, 1979)
United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellant.

WIDENER, Circuit Judge:

Marvin Mandel, Governor of the State of Maryland, W. Dale Hess, Harry W. Rodgers, William A. Rodgers (brother of Harry Rodgers), Irvin Kovens, Maryland businessman, and Ernest N. Cory, a Maryland attorney (hereinafter "Appellants"), appeal from their convictions for mail fraud and racketeering violations under 18 U.S.C. § 1341[1] and 18 U.S.C. § 1961 et seq.[2] (The

[1] 18 U.S.C. § 1341 (mail fraud statute and § 1341) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction

Organized Crime Control Act), respectively. Appellants were each adjudged guilty of fifteen counts of mail fraud under § 1341 and one count of prohibited racketeering activity under § 1961 et seq.[3] Appellant Mandel was sentenced to a four-year prison term; Appellants Hess, Harry Rodgers, and Kovens were each sentenced to four years' imprisonment and fined $40,000; Appellant William Rodgers was sentenced to 20 months' imprisonment and fined $40,000; and Appellant Cory was sentenced to 18 months' imprisonment. Additionally, pursuant to 18 U.S.C. § 1963(a), Appellants Hess, Harry Rodgers, William Rodgers, Kovens, and Cory were ordered to forfeit their ownership interests in the Southern Maryland Agricultural Association, Inc., based upon their convictions under count 24 of the indictment.

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thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] 18 U.S.C. § 1962, entitled Prohibited activities, provides in pertinent part:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[3] The indictment charged Appellants with 20 counts of mail fraud. The jury, after 13 days of deliberation, in the middle of which it was given a modified *Allen* charge by the district court, returned verdicts of guilty against the Appellants on all but three of the mail fraud counts. The jury returned verdicts of not guilty on counts 5, 6, and 14 (mail fraud) of the indictment. The district court entered judgments of acquittal as to counts 19 and 20 (mail fraud) of the indictment.

The gist of the mail fraud counts of the indictment charged that beginning between January 7, 1969 and the spring of 1971, and continuing thereafter to the date of the filing of the indictment, Appellants devised and intended to devise a scheme and artifice:

"(a) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of MARVIN MANDEL, in his official capacities as Governor of the State of Maryland, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud;

"(b) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have the state's business and its affairs conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud, and in accordance with the laws and Code of Ethics of the State of Maryland;

"(c) To defraud the citizens of the State of Maryland, and its governmental depart-

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Additionally, the indictment charged various combinations of the Appellants with 4 counts of prohibited racketeering activity. Governor Mandel was charged with engaging in a pattern of racketeering activity in counts 21 and 22 of the indictment. Appellants Hess, Harry Rodgers, and William Rodgers were charged with engaging in a pattern of racketeering activity in count 23 of the indictment. And, Appellants Hess, Harry Rodgers, Williams Rodgers, Kovens, and Cory were charged with engaging in a pattern of racketeering activity in count 24 of the indictment. Count 22 was dismissed prior to trial. The jury returned verdicts of guilty on counts 21, 23, and 24 of the indictment. The district court entered a judgment of acquittal on count 23 of the indictment, from which the government has appealed.

ments, agencies, officials and employees, both executive and legislative, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when:

(1) drafting, considering and deliberating upon proposed legislation for the State of Maryland with respect to the Maryland horse racing industry and to other matters;

(2) administering the laws of the State of Maryland with respect to the Maryland horse racing industry and to other matters; and

(3) transacting business for and on behalf of the State of Maryland;

"(d) To obtain, directly and indirectly, money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts, relating to the Marlboro Race Track, the Bowie Race Track, the Security Investment Company, Ray's Point, Inc., and to other matters." (from count 1, para. 13, of the indictment).

Paragraphs 14 through 32 of count 1 set forth the specifics of the alleged scheme to defraud. These specifics include allegations of bribery and the misrepresentation and concealment of material information on the part of the Appellants. Counts 2 to 20 incorporate by reference the allegations contained in count 1 and charge Appellants with various particular uses of the mails in the execution of the alleged scheme.

In the racketeering counts, the government charged Governor Mandel in count 21 with acquiring and maintaining an interest in and control of the Security Investment Company through a pattern of racketeering activity that included mail fraud and bribery. Count 23 charged Hess, Harry Rodgers, and William Rodgers with conducting and participating in the conduct of the

affairs of the Security Investment Company through a pattern of racketeering activity that included mail fraud and bribery. Count 24 charged Hess, Harry Rodgers, Williams Rodgers, Kovens, and Cory with conducting and participating in the conduct of the affairs of the Marlboro Race Track through a pattern of racketeering activity that included mail fraud.

The evidence adduced at trial focused upon the specific allegations contained in count 1 of the indictment, i.e., the alleged bribery of Governor Mandel and the alleged misrepresentation and concealment of material information on the part of Appellants. The facts developed at trial touching upon the alleged bribery of the Governor and the alleged misrepresentation and concealment of material information by Appellants were essentially uncontroverted. The dispute centered on the proper inferences that could be drawn from these facts.

The evidence adduced at trial included the following: In February 1971, the owners of Marlboro Race Track (who at the time did not include any of the Appellants), a small half-mile track located in Prince George's County, Maryland, contracted with the owners of Hagerstown Race Track, a half-mile track located in Washington County, Maryland, for the transfer to Marlboro of the 18 racing dates allotted to Hagerstown. Since the Maryland horse racing industry is regulated by the State and the permanent transfer of racing days requires the affirmative approval of the Maryland General Assembly, a bill designated as House Bill 1128 was drafted by attorneys for Marlboro and Hagerstown and submitted to the Maryland House of Delegates. The bill, as initially drafted, provided for a straight-forward approval of the transfer contract. However, prior to its passage, the bill was amended to provide that Marlboro would make its payments to the State of Maryland and then the State would make payments to Hagerstown. On May 28, 1971, Governor Mandel vetoed the bill in its amended form because he was advised that the payment provision was unconstitutional.

Subsequent to the veto, the owners of Marlboro actively began to attempt to sell the racetrack. Cory, acting on behalf of undisclosed clients, negotiated with the owners of Marlboro for its purchase. On December 31, 1971, the controlling interest in Marlboro was sold to the group represented by Cory. As of December 31, 1971, that group consisted of Appellants Hess, Harry Rodgers, William Rodgers, and Irving Schwartz, a longtime friend and business associate of Kovens. Schwartz had previously purchased 17,000 shares of Marlboro stock. At the time of settlement, the sellers of Marlboro did not know the identity of the members of the purchasing group except for Schwartz.

The purchase of Marlboro was in part financed by a $1,825,000 loan from the Suburban Trust Company. The balance of the purchase price was funded by Schwartz and Harry Rodgers. The government contended that Schwartz was merely a nominee for Kovens in the purchase of Marlboro. It introduced evidence to show that Kovens provided much of the funding for the initial purchase payments and subsequent loan interest payments made by Schwartz; that Kovens and Schwartz altered check stubs and other documents manifesting Kovens' financial involvement in the purchase of Marlboro; and that Kovens played a major role in the management of Marlboro following its purchase.

The Marlboro purchasing group did not want their identities revealed. Thus, on January 1, 1972, Eugene Casey, who had been chosen by the purchasers to act as president of Marlboro, announced at a press conference that he was the new purchaser of Marlboro. On January 7, 1972, Casey and Cory prepared and sent a letter to the Maryland General Assembly stating that Casey had recently acquired ownership of Marlboro and requested that Governor Mandel's veto of House Bill 1128 be overridden. A disputed issue of fact was whether Governor Mandel knew the true identities of the new purchasers of Marlboro.

On January 12, 1972, the General Assembly overrode the Governor's veto of House Bill 1128. As a result of the veto override, the racing days belonging to Marlboro doubled from 18 to 36. The government introduced the testimony of several Maryland state senators who stated that Senator Staten, Governor Mandel's legislative ally, said shortly before the veto override vote that the Governor would not mind if his veto of House Bill 1128 were overridden. Additionally, the government adduced testimony from some senators that if they had known of the involvement in Marlboro of the Appellants other than the Governor, and of their business relationships with Governor Mandel, they would have considered such information relevant in their consideration of the veto override.

In mid-March 1972, a bill to consolidate Maryland race tracks in a variety of ways (consolidation bill) was introduced in the State Senate. The consolidation bill, *inter alia,* provided for Marlboro's racing days to be increased from 36 to 94 and provided for Marlboro to run its days at the State's two one-mile tracks. The government introduced evidence to show that Governor Mandel engaged in a strenuous lobbying effort to secure passage of the consolidation bill. It also introduced evidence that Kovens lobbied hard behind the scenes for the passage of the consolidation bill. At the time the consolidation bill was pending before the General Assembly, the true identities of the owners of Marlboro were not known. The government introduced the testimony of some members of the Maryland State Senate who stated that in deciding how to vote on the consolidation bill they would have considered it relevant to have known that Hess, Kovens, Harry Rodgers, and William Rodgers were in fact the owners of Marlboro and had provided substantial financial benefits to Governor Mandel. Appellants introduced evidence to the effect that consolidation of the racing industry had long been a topic of interest in Maryland, and one in which Governor Mandel had long played a leading role. His support of such a measure antedated

by years the various incidents appearing in this case which involved Marlboro.

The consolidation bill had been embroiled in controversy since its introduction. After being passed by the Senate in amended form, it was passed by the House of Delegates in its original form and returned to the Senate for a final vote. The bill was never brought to a vote in the Senate.

A plethora of evidence was introduced on Appellants' alleged scheme to defraud by misrepresenting and concealing the true identities of the owners of Marlboro. In all the dealings between Marlboro and the Maryland Racing Commission and the General Assembly between 1972 and 1974, the fact that Hess, Harry Rodgers, William Rodgers, and allegedly Kovens, were the true owners of Marlboro was never revealed. The government contended that with a total lack of accurate information, the Maryland Racing Commission granted to Marlboro a series of administrative benefits that caused substantial profit to accrue to Hess, Harry Rodgers, William Rodgers, Kovens, and Cory. Appellants countered the government's evidence by maintaining that prior to the passage of a strict disclosure law in 1974, the use of nominees rather than publicly revealing the names of the beneficial owners of racetracks was a common and legal practice.

As an example of the alleged fraudulent concealment of the true identities of the owners of Marlboro, the government pointed to the Marlboro-Bowie merger. On December 28, 1972, Marlboro Race Track and Bowie Race Track, a one-mile track, were merged. The stock of Marlboro and the assets of Bowie were transferred to a newly established corporation, Southern Maryland Agricultural Association, Inc., with the former owners of Marlboro being issued 30% of the stock in the new company. Appellants' share of Southern Maryland Agricultural Association, Inc. stock was issued to Marlboro Associates. On February 16, 1973, Hess, Harry Rodgers, and William Rodgers transferred their

interest in Marlboro Associates to Cory by way of an agreement which included a non-recourse note. Under the terms of the transfer, Cory was to have five years to fund the purchase price ($630,000) himself or to arrange for the sale of the stock to a third person. If at the expiration of the five-year period the purchase price was not paid, the stock would revert to the original owners. In a document furnished to the Racing Commission in 1973, Cory was listed as the owner of the portion of Marlboro Associates formerly owned by Hess, Harry Rodgers, and William Rodgers, as well as the portion originally owned by him.

Evidence also was adduced on the flow of undisclosed financial and other benefits to Governor Mandel from some of the other Appellants. The main purpose of this evidence, from the government's standpoint, was to show that Governor Mandel took positions favorable to the owners of Marlboro on House Hill 1128 and the consolidation bill in return for these benefits.

At trial, there was evidence which tended to show that Governor Mandel, *inter alia,* received the following: (1) in 1969, clothing purchased from Alper and Myers, a Baltimore clothing store, paid for by checks drawn on Charlestown Race Track, which was principally owned at the time by Kovens. Charlestown recorded the checks as expenditures for guard uniforms; (2) in 1970, a diamond bracelet for his wife, Barbara, paid for by Hess and Harry Rodgers; (3) in April 1972, clothing from Cuzzens, a Ft. Lauderdale, Florida, men's store, paid for by Harry Rodgers; (4) in September 1974, clothing from Max Margolis, a Baltimore clothing store, paid for by Kovens.

The government also placed special emphasis on Governor Mandel's involvement in Ray's Point, Inc. and Security Investment Company. Ray's Point is a parcel of land consisting of approximately 200 acres of waterfront property located on the eastern shore of Maryland. In December 1971, an investment group consisting of Appellants Hess, Harry Rodgers, and

William Rodgers, and Nathan Cohen, and Thomas Hunter Lowe, Speaker of the Maryland House of Delegates, purchased Ray's Point, and, for tax purposes, formed Ray's Point, Inc. to hold the land.[4] Hess, Harry Rodgers, and William Rodgers assigned a 15 percent interest in Ray's Point, Inc. to Governor Mandel, with the 15 percent interest coming in equal shares from their respective interests. Appellant Mandel's 15 percent interest consisted of 150 shares in Ray's Point, Inc.; he paid $1 per share, a comparable price to that paid by the other shareholders. In order to finance the purchase price of the land and incidental expenses of development, Ray's Point, Inc. borrowed $350,000 on a mortgage given to the Equitable Trust Bank. The mortgage was guaranteed by Hess, Harry Rodgers, and William Rodgers, and Nathan Cohen, but not by Governor Mandel or Thomas Hunter Lowe.

The first corporate minute book prepared on behalf of Ray's Point, Inc., listed the names of all the shareholders. However, subsequently a new list was prepared that omitted the names of Governor Mandel and Thomas Hunter Lowe. Governor Mandel's and Thomas Hunter Lowe's interests in Ray's Point, Inc., were reflected by stock certificates held by nominees, with Governor Mandel's certificate being held by Hess.

In May 1972, Hess assigned to Governor Mandel a 4 percent interest in Security Investment Company. Security Investment Company is a limited partnership formed in 1967 by Harry and William Rodgers, and some other persons, that, among other things, leases two office buildings to the Federal Social Security Administration in Baltimore. In March 1972, Hess was admitted as a 9 percent partner in Security Investment Company, effective retroactively to December 1971. On May 15, 1972, retroactive to January 1, 1972, Hess assigned to Governor Mandel $\frac{1}{9}$ths of his interest in

[4] Each of these investors had a 20 percent interest in Ray's Point, Inc. Lowe is not now the Speaker of the Maryland House.

Security Investment Company. According to Hess and Governor Mandel, the assignment represented legal fees owed to Mandel for legal services rendered several years earlier, although there was evidence that the income from the Security interest was not correctly reported on the Governor's income tax return and that Hess' records with respect to the same had been altered.

Based upon the proximity between Governor Mandel's acquisition of interests in Ray's Point, Inc. and Security Investment Company, as well as his receipt of other benefits, and the Maryland General Assembly's consideration of Governor Mandel's veto of House Bill 1128 and the consolidation bill, the government argued that Mandel took positions on House Bill 1128 and the consolidation bill favorable to the owners of Marlboro Race Track in return for those financial and other benefits. Combined with the misrepresentations and concealment of the true identities of the owners of Marlboro and the financial relationships existing between Mandel and the other Appellants, the government contended that the Appellants' conduct constituted a scheme to defraud the citizens and the State of Maryland. Appellants contended that all aspects of their conduct were legally innocent and the inferences drawn by the government were unsupportable.

Appellants have raised a myriad of issues on appeal. Because we reverse their convictions for trial error committed in the court below, we do not find it necessary to express an opinion on all of the issues presented in the briefs.

I

Appellants contend that their prosecution and conviction under the mail fraud statute constitutes an unwarranted overextension of that statute and an impermissible federal intrusion into the political affairs of the State of Maryland. They assert that their prosecution and conviction under § 1341 in this case constitutes an unwarranted overextension of that statute in that "there was no evidence that any state or

federal law was transgressed by any of the defendants in the execution of any part of their so-called 'corrupt relationship,' or scheme to defraud. At most, the alleged scheme to defraud was but a non-criminal scheme of non-disclosure." Along the same line, Appellants cryptically state, "No previous mail fraud prosecution has permitted conviction of a public official to rest upon the slim reed of a federal prosecutor's untutored notion of what the public or the state should expect by way of an ethical and honest performance of a state official's duties. In every previous case, the criminal law or common law provided some guidance for assessing 'the loyal and honest services' of the public official." They also assert that the use of the mail fraud statute in this case constitutes an impermissible federal intrusion into the political affairs of the State of Maryland in that the government "cast the mail fraud counts of [the] indictment . . . as if the Federal Government were *parens patriae* for 'the citizens of the state of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative.'" In Appellants' view, "the thrust of the indictment and the prosecution was . . . to impose mail fraud and racketeering sanctions on these defendants, including the Governor of the State, in order to insure that Maryland will in the future have more adequate disclosure requirements. [footnote omitted] In that way, presumably, the citizens, the state legislature and the state governmental agencies will have more information in arriving at political and official judgments. And in that way, the State of Maryland might in some way have a more republican and responsible form of government." Appellants maintain that use of § 1341 in such a way violates the principles of federalism so central to our form of government.

We are cognizant of the problem of the ever expanding use of the mail fraud statute to reach activities that heretofore were considered within the exclusive domain of State regulation. See *United States v. Caldwell,* 544 F.2d 691, 697 (4th Cir. 1976) (concurring opinion). See

also *United States v. McNeive,* 536 F.2d 1245, 1252 (8th Cir. 1976); *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir. 1972), cert. den., 409 U.S. 891. Additionally, we note that statutes such as the mail fraud statute should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. See *United States v. Kelem,* 416 F.2d 346, 347 (9th Cir. 1969), cert. den., 397 U.S. 952 (1970). Nevertheless, we think the indictment and prosecution in this case constitute neither an unwarranted overextension of the mail fraud statute, as that phrase is used by Appellants, nor an impermissible federal intrusion into the political affairs of the State of Maryland, but as will be later noted we do not adopt the broad reading of the statute sought by the United States.

A

As just stated, we think the claim that prosecution under § 1341 constitutes an impermissible federal intrusion into the political affairs of the State of Maryland and thus violates principles of federalism is without merit. The purpose of the mail fraud statute and the corresponding limits upon its appropriate use, in the context of federalism problems, is clear. The purpose of § 1341 and its predecessors is to prevent the post office department from being used to carry our fraudulent schemes. See *Durland v. United States,* 161 U.S. 306, 314 (1895) (interpreting a predecessor to § 1341). See also *United States v. States,* 488 F.2d 761, 767 (8th Cir. 1973), cert. den., 417 U.S. 909 (1974) (purpose of § 1341 is to prevent the misuse of the Postal Service). The constitutionality of the mail fraud statute and the limits upon its use to effectuate its purpose were stated by the Supreme Court in the following terms:

> "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. [citation omitted] Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."

Badders v. United States, 240 U.S. 391, 393 (1916) (interpreting a predecessor statute to § 1341). See also *Parr v. United States,* 363 U.S. 370, 389 (1960).

The basic purpose and scope of the mail fraud statute has been examined by numerous circuit courts as well. This Court, in *United States v. Brewer,* 528 F.2d 492 (4th Cir. 1975), echoed the words of the Supreme Court in *Durland* by stating, "[the mail fraud statute] prevents the post office from being used as an instrument of crime." Id. at 498. We also followed *Badders* by stating that "[t]he statute does not define a scheme to defraud, and it contains no restrictive language excluding any type of fraudulent conduct in which use of the mails plays an essential rule. On the contrary, the plain language of the statute condemns any scheme to defraud in which the mails are employed. . . ." [citation omitted] Id. at 494-95. The Second Circuit has likewise recognized that the mail fraud statute's purpose and scope revolve around the misuse of the mails in *Gouled v. United States,* 273 F 506, 508 (2d Cir. 1921), aff'd, 255 U.S. 298 (1921), and the Eighth Circuit has stated the purpose and scope of the mail fraud statute in almost the same language as that used by the Second Circuit in *Gouled.* See *United States v. States,* 488 F.2d 761, 764 (8th Cir. 1973), cert. den., 417 U.S. 909 (1974). The Tenth Circuit, in *United States v. Lynn,* 461 F.2d 759, 763 (10th Cir. 1972), described the reach of the mail fraud statute in the following terms: "The federal mail fraud statute does not purport to reach all frauds, but only those instances in which the use of the mails is a part of the execution of the fraudulent scheme. All other cases are to be dealt with by appropriate state law." (footnote omitted).

From the foregoing discussion, it is clear that the regulation of the mail fraud statute is on the misuse of the mails, control of which lies with Congress, and not on the substance of the scheme to defraud. Even if the substance of the scheme to defraud involves matters normally within the purview of state control or

regulation, once the mails are utilized to effectuate the scheme, the federal government has the right to prosecute the schemer under the mail fraud statute.

In *United States v. States, supra,* an attack, similar to the one made by Appellants in this case, was made on the use of § 1341, i.e., that the application of the mail fraud statute to matters traditionally left to the states violated principles of federalism. In that case, the federal government prosecuted two candidates for the office of Committeeman in the City of St. Louis, Missouri, for devising and carrying out a scheme to defraud the voters and residents of two wards in the City of St. Louis and the Board of Election Commissions of the City of St. Louis by the use of fraudulent voter registrations and applications for absentee ballots. The court stated:

> "[A]ppellants argue that the application of the mail fraud statute as to the facts of this case will result in a 'policing' of state election procedure, and that Congress has never explicitly authorized such widespread intervention into state affairs. The appellants' argument misinterprets the purpose of the mail fraud legislation. The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails. . . . The purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law." Id. at 766-67.

A similar holding was *United States v. Mirable,* 503 F.2d 1065 (8th Cir. 1974), cert. den., 420 U.S. 973 (1975), in which the scheme involved understatement of gross sales in monthly sales/use tax returns. We fully agree with the Eighth Circuit's statement in *United States v. States* concerning the proper scope of the mail fraud statute in relation to principles of federalism and, thus, reject Appellants' contention that the use of the mail

fraud statute in this case constitutes an impermissible federal intrusion into the political affairs of the State of Maryland. Appellants were indicted, prosecuted and convicted for the alleged misuse of the mails and the fact that the alleged scheme to defraud involved matters traditionally of state concern is not a defense to the prosecution.

B

We think Appellants' contention that their convictions were based on an unwarranted overextension of the mail fraud statute is likewise without merit.[5] The essence of Appellants' contention is that since the government's theory of the case did not depend upon the violation of any state or federal law, including the common law, in the execution of the alleged scheme to defraud, the indictment, prosecution and conviction under § 1341 constitute an unwarranted overextension of that statute. Our reading of the indictment and survey of the evidence adduced by the government at trial[6] reveals that Appellants were indicted and prosecuted for devising a scheme and artifice to defraud the citizens of the State of Maryland and her governmental departments, agencies, officials and employees, both executive and legislative, of the right to conscientious, loyal, faithful, disinterested and honest government through bribery[7] and non-disclosure and concealment of material information. As our discussion of the relevant case law will show, a scheme to defraud that involves bribery and non-disclosure and concealment of material information may come within the purview of the federal mail fraud statute even though no state or federal statute or common law is transgressed in terms.

[5] In this section of the opinion, we are dealing solely with the issue of whether the government's indictment and prosecution of the Appellants constitute an unwarranted overextension of the mail fraud statute. The issue of whether the jury was properly instructed on the law with regard to the mail fraud counts will be discussed *infra*.

[6] We have reviewed the record, including evidence that we have determined was improperly admitted, in order to determine the direction of the government's prosecution in this case.

[7] Paragraph 27 of count 1 alleges that, "*Marvin Mandel* would and did . . . *in return for* certain financial and other benefits . . . act with intent to aid and assist certain legislation and legislative matters financially beneficial to the owners of the Marlboro Race Track." (emphasis added). Additionally, sub-paragraphs 13(a) and (b) specifically allege that Appellants devised a scheme to defraud the citizens of the State of Maryland of the loyal and faithful services of their Governor and of their right to have the state's business and its affairs conducted honestly and impartially, free from, *inter alia*, bribery. Appellants contend that the government abandoned its claim that the alleged scheme involved bribery. There can be no question that a large portion of the government's evidence focused on the alleged scheme to defraud through bribery. The deficiency, if any, that exists with regard to the alleged bribery element in this case relates to the jury instructions, which will be discussed *infra*.

Congress first enacted the federal mail fraud statute in 1872,[8] and, although it has since been amended five times, the essential elements of an offense under the statute have remained unchanged.[9] See *Survey of the Law of Mail Fraud*, 1975 Ill. L. F. 237, 239. Even though the mail fraud statute has been in existence for over 100 years, Congress has never defined or established the precise limits of the phrase "scheme or artifice to defraud." See *United States v. McNeive*, 536 F.2d 1245, 1248 (8th Cir. 1976). Perhaps it is because, as one court has aptly pointed out, "The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity." *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941), cert. den., 314 U.S. 687. Nevertheless, since Congress has not attempted to define the phrase "scheme or artifice to defraud," the burden to do so has fallen on the courts. In order to

[8] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

[9] The essential elements of an offense under the statute are: (1) a scheme to defraud; and, (2) the mailing of a letter, etc., for the purpose of executing the scheme. See, e.g., *United States v. Brewer*, 528 F.2d 492, 494 (4th Cir. 1975).

determine the appropriate reach of the mail fraud statute, it has been necessary for the courts to attempt to define and establish the limits of the words "scheme or artifice to defraud" as they are used in the mail fraud statute. See *United States v. McNeive,* 536 F.2d 1245, 1248 (8th Cir. 1976).

In attempting to define and establish the meaning of the words, scheme to defraud, the starting point for most courts has been to discern the purpose of the mail fraud statute. As previously stated, the purpose of the statute is to prohibit the misuse of the mails. See, e.g., *Durland v. United States, supra; United States v. States, supra.* With this purpose in mind, numerous courts have made general statements concerning the approach courts should take in attempting to define and establish the limits of the words "scheme or artifice to defraud." For example, the Eighth Circuit has stated, "[T]he definition of fraud in § 1341 is to be broadly and liberally construed to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises." *United States v. States,* 488 F.2d at 764. See also *United States v. Keane,* 522 F.2d 534, 544 (7th Cir. 1975), cert. den., 424 U.S. 976 (1976); *United States v. Buckner,* 108 F.2d 921, 926 (2d Cir. 1940), cert. den., 309 U.S. 669.

For the most part, courts have broadly construed the words, "scheme or artifice to defraud." The result has been to include within that term many schemes involving deception which employ the mails in their execution if they are contrary to public policy and fail to measure up to accepted moral standards and notions of honesty and fair play. In *Badders v. United States,* 240 U.S. 391, 393 (1916), the Court stated, "Whatever the limits to [Congress'] power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy. . . ." See also *Parr v. United States,* 363 U.S. 370, 389 (1960). This public policy reference has been followed by some courts as setting the outer limits to the term "scheme or artifice to

defraud" as that term is used in the mail fraud statute, i.e., any scheme contrary to public policy that involves deception can be prosecuted under the mail fraud statute if the mails are used in the execution of the scheme. See, e.g., *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir. 1972), cert. den., 409 U.S. 891. Other cases have used accepted moral standards and notions of honesty and fair play as setting the outer limits to the term "scheme to defraud." In *Gregory v. United States,* 253 F.2d 104, 109 (5th Cir. 1958), the court stated, "The aspect of the scheme to 'defraud' is measured by nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." To the same effect is *Blachly v. United States,* 380 F.2d 665, 671 (5th Cir. 1967). See also *United States v. Keane,* 522 F.2d 534, 545 (7th Cir. 1975), cert. den., 424 U.S. 976 (1976); *United States v. States,* 488 F.2d 761, 764 (8th Cir. 1973), cert. den., 417 U.S. 909 (1974). The *Blachly* court concluded by stating that this was indeed a broad definition of scheme to defraud. 380 F.2d at 671.

Early in the history of the mail fraud statute, attempts were made to severely limit the term, scheme to defraud. In *Durland v. United States,* 161 U.S. 306, 313-14 (1895), the Supreme Court rejected the argument that the term "scheme or artifice to defraud" as used in the mail fraud statute was limited to common law concepts of fraud and false pretenses. See also *United States v. McNeive,* 536 F.2d 1245, 1247 (8th Cir. 1976). And the several courts that have been called upon to decide the question are uniformly of opinion that the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute. See *United States v. McNeive,* 536 F.2d 1245, 1247, n.2 (8th Cir. 1976); *United States v. Keane,* 522 F.2d 534, 544 (7th Cir. 1975), cert. den., 424 U.S. 976 (1976); *United States v. States,* 488 F.2d 761, 767 (8th Cir. 1973), cert.

den., 417 U.S. 909 (1974); *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir. 1972), cert. den., 409 U.S. 891. As a result of the failure to limit the term "scheme or artifice to defraud" to common law definitions of fraud and false pretenses and schemes prohibited by State law, the mail fraud statute generally has been available to prosecute a scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.

C

Without enumerating the various types of schemes that have been held cognizable under the mail fraud statute, it suffices to say that schemes involving bribery and some schemes of non-disclosure and concealment of material information come within the purview of the mail fraud statute.[10] See, e.g., *United States v. Brown,*

[10] In *United States v. McNeive,* 536 F.2d 1245, 1248-49 (8th Cir. 1976), the court categorized the various schemes that have been held violative of the mail fraud statute into two general categories. The court stated:

> "The first category, which comprises the bulk of the mail fraud cases, includes the many deceptive schemes which are intended to defraud individuals of money or other tangible property interests. There can be little dispute that these schemes are within the scope of § 1341 since they involve calculated efforts to use misrepresentations or other deceptive practices to induce the innocent or unwary to give up some tangible interest."
>
> * * * *
>
> "The second category of § 1341 deceptive schemes is comprised of those which operate to deprive individuals of intangible rights or interests."

Appellants' alleged scheme to defraud falls within *McNeive's* second category in that they are charged with devising a scheme and artifice to defraud the citizens of the State of Maryland and its governmental departments, agencies, officials and employees of the right to conscientious, loyal, faithful, disinterested and honest government, i.e., intangible rights and interests.

540 F.2d 364 (8th Cir. 1976); *United States v. Bush,* 522 F.2d 641 (7th Cir. 1975), cert. den., 424 U.S. 977 (1976); *United States v. Keane,* 522 F.2d 534 (7th Cir. 1975), cert. den., 424 U.S. 976 (1976); *United States v. Issacs,* 493 F.2d 1124 (7th Cir. 1974), cert. den., 417 U.S. 976; *United States v. Caldwell,* 544 F.2d 691 (4th Cir. 1976). At this late date, there can be no real contention that many schemes to defraud a state and its citizens of intangible rights, e.g., honest and faithful government, may not fall within the purview of the mail fraud statute. See *United States v. Brown,* 540 F.2d 364, 374 (8th Cir. 1976); *United States v. States,* 488 F.2d 761, 764 (8th Cir. 1973), cert. den., 417 U.S. 909 (1974). Rather, the difficulty is whether the alleged scheme satisfies the fraud element of the mail fraud statute. Cf. *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976) (reversal of a conviction under the mail fraud statute because an effort to avoid disclosure, although a breach of statutory obligation, was "hardly 'a scheme or artifice to defraud' ").

As to whether a scheme involving the bribery of a public official satisfies the fraud element of the mail fraud statute, the question has long since been answered in the affirmative. Although most mail fraud prosecutions of public officials that allege bribery also allege that a state bribery law or law prohibiting the taking of additional fees has been violated, see, e.g., *United States v. Caldwell,* 544 F.2d 691, 694 (4th Cir. 1976); *United States v. Barrett,* 505 F.2d 1091, 1104, n.12 (7th Cir. 1974), cert. den., 421 U.S. 964 (1975), such an allegation is not necessary to bring the alleged scheme within the purview of the mail fraud statute, for, as the court stated in *Shushan v. United States,* 117 F.2d 110, 115 (5th Cir. 1941), cert. den., 313 U.S. 574,

> "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. . . . No trustee

> has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such as one must in the federal law be considered a scheme to defraud."

The *Shushan* rationale has recently been restated by the Eighth Circuit in somewhat different language:

> ". . . [I]t has been held in recent years that a public official may be prosecuted under 18 U.S.C. § 1341 if he devises a scheme whereby bribes or kickbacks are accepted in the course of conduct of his office, since such conduct operates to defraud the citizens of his government of their right to his honest and faithful services. [citations omitted]."

United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976).

It is clear from *Shushan* and its many following cases that the fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters. See, e.g., *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976) (bribery of public official constitutes fraud since the public official has been paid to act in breach of his duties). A fraud is perpetrated upon the public to whom the official owes fiduciary duties, e.g., honest, faithful and disinterested service. When a public official has been bribed, he breaches his duty of honest, faithful and disinterested service. While outwardly purporting to be exercising independent judgment in passing on official matters, the official has been paid for his decisions, perhaps without even considering the merits of the matter. Thus, the public is not receiving what it expects and is entitled to, the public official's honest and faithful service.

From the foregoing discussion, it is clear that the allegations contained in paragraphs 13(a) and (b) and 27 of count 1 of the indictment in this case constitute a scheme to defraud that is cognizable under § 1341. Those paragraphs essentially allege that Governor

Mandel, in return for certain financial and other benefits, took certain positions on racetrack legislation that was before the Maryland legislature. This is a plain and simple bribery allegation; that Governor Mandel did not exercise his independent judgment on these legislative matters; rather he was paid by some or all of the Appellants for the positions he took.

The question of whether non-disclosure or concealment, or both, of material information satisfies the fraud element of the mail fraud statute and, thus, is cognizable as a "scheme or artifice to defraud" under § 1341 is not as clear-cut as the bribery issue.

It should first be noted that a duty to disclose material information need not necessarily be based upon the existence of some statute or regulation prescribing such a duty. Rather, the duty to disclose may exist because of the relationship between the one possessing the material information and another, for example, employer-employee; public official-public body. As the Seventh Circuit recently stated:

> [A]n employee owes his employer a duty of loyalty which includes a duty not to conceal facts known to him which he has reason to believe are material to the employer's conduct of its business and affairs. Thus, [a government official's] duty to disclose need not be based upon the existence of some statute prescribing such a duty.

United States v. Bush, 522 F.2d 641, 652 (7th Cir. 1975), cert. den., 424 U.S. 977 (1976). See also *United States v. Brown,* 540 F.2d 364, 375 (8th Cir. 1976). But Cf. *United States v. Rabbitt,* 583 F.2d 1014, 1026 (8th Cir. 1978) (stating that a state legislator was under no affirmative duty to disclose his interest in a matter because "[t]he Government refer[red] to no standard of conduct applicable to legislators which clearly required disclosure of [the legislator's] interest in the [matter] . . . ."). So far as relevant in this case, the Governor of the State of Maryland is trustee for the citizens and the State of Maryland and thus owes the normal fiduciary duties of

a trustee, e.g., honesty and loyalty. See *The Declaration of Rights of the Maryland Constitution,* Art. 6; *Kerpelman v. Board of Public Works,* 261 Md. 436, 276 A.2d 56, 61 (1971), cert. den. 404 U.S. 858.

Although failure by a public official to disclose material information would constitute a breach of fiduciary duty, that breach, standing alone, could never be cognizable under the mail fraud statute, see *United States v. Bush,* 522 F.2d 641, 648 (7th Cir. 1975), cert. den. 424 U.S. 977 (1976), for the mail fraud statute only reaches schemes or artifices to defraud. Thus, the breach of fiduciary duty must be linked with some actionable fraud in order for the proscriptions of the mail fraud statute to apply. Cf. *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976) (effort to avoid disclosure, although a breach of obligation was "hardly 'a scheme or artifice to defraud' in the sense of the mail fraud statute. . . .")

There are two situations relevant to this case in which non-disclosure or concealment, or both, of material information may constitute actionable fraud under the mail fraud statute as well as a breach of fiduciary duties.[11] The first situation is where a public official fails to disclose the existence of a direct interest in a matter that he is passing on. Provided the requisite intent is shown, the official's failure to disclose the existence of a direct interest in a matter that he is passing on defrauds the public and pertinent public bodies of their intangible right to honest, loyal, faithful and disinterested government.

In *Shushan v. United States,* 117 F.2d 110 (5th Cir. 1941), cert. den. 313 U.S. 574, the court upheld the conviction under the mail fraud statute of one Waguespack, a member of a Louisiana parish levee board and

[11] Of course, since fraud is a crime requiring specific intent, before non-disclosure or concealment of material information could be deemed actionable fraud cognizable under the mail fraud statute, a specific intent to defraud would have to be proven.

Chairman of the Finance Committee, for receiving undisclosed fees from the underwriter of a plan to refund outstanding bonds of the levee district. Waguespack, in his official capacity, took part in the decision of whether to adopt the refunding plan. And, in *United States v. Keane,* 522 F.2d 534 (7th Cir. 1975), cert. den. 424 U.S. 976 (1976), the court upheld the conviction of Thomas Keane, former Alderman of Chicago's Thirty-First Ward and Chairman of the City Council's Committee on Finance, for his participation in a scheme to purchase, through an investment company, tax delinquent property from county-sponsored scavenger sales. Keane voted on certain matters that favorably affected property the investment company had purchased without disclosing his interest to the other aldermen. For other examples of courts deeming a public official's nondisclosure of a direct interest in matters that he is passing on supportive of a violation of the mail fraud statute, see, e.g., *United States v. Brown,* 540 F.2d 364, 374-75 (8th Cir. 1976); *United States v. Bush,* 522 F.2d 641, 648 (7th Cir. 1975), cert. den. 424 U.S. 977 (1976).

The other situation applicable here in which we think fraudulent non-disclosure or concealment of facts may be evidence to support a conviction under the mail fraud statute is when there has been a fraudulent statement of facts, or a deliberate concealment thereof, to a public body, in order to receive a benefit by action of the public body. The scheme to defraud can in such a case be said to encompass not only the receipt of the illicit benefit, but also the deprivation of the public of the right to have its officials act on other than false information.[12] This is the type of fraud prosecuted in *United States v. Feinburg,* 535 F.2d 1004 (7th Cir. 1976),

[12] At this point, we note that in *United States v. Caldwell, supra,* we implicitly held that we would not adopt the construction of the mail fraud statute some contend is required by *Hammerschmidt v. United States,* 265 U.S. 182 (1924), to the effect that pecuniary or property injury is necessary.

cert. den. 429 U.S. 929, in which the mails were used to carry out a scheme to procure a lower tax assessment by falsely representing the demolition date of buildings to the Office of Real Estate Board of Appeals of Cook County, Illinois. Similarly, in *United States v. Flaxman*, 495 F.2d 344 (7th Cir. 1974), cert. den. 419 U.S. 1031, a conviction was sustained for making a false retailer's occupation tax return to the State of Illinois, the return being made by a Certified Public Accountant, in connivance with the owner of a store; and in *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), cert. den. 420 U.S. 973, the court sustained the conviction of a restaurant owner who had understated gross retail sales in a sales/use tax return mailed to the Missouri Department of Revenue.

As these principles apply to the case at hand, it is apparent that the mail fraud case could have been submitted on either or both of two theories on the indictment and record now before us. First, that Governor Mandel had either been bribed as a part of a scheme to defraud or that attempts had been made to bribe Governor Mandel as a part of such scheme. Second, that false information was presented to, or true information concealed from, the Maryland General Assembly or Maryland Racing Commission, or both, in order to induce those bodies to take favorable action toward those interested in Marlboro, and later Bowie. It is equally as apparent that the case could not have been submitted on the theory that Governor Mandel had a direct interest in the racetrack business, for no direct connection on his part was either alleged or proven.

II

Appellants further contend that the district court erred in rejecting certain of their proffered instructions and in omitting certain instructions in its charge to the jury on the mail fraud counts of the indictment. The essence of this argument is that the jury was inadequately charged on the law with regard to the mail fraud counts. They attack the district court's failure to

give a bribery instruction in connection with the mail fraud counts as well as the failure to give an instruction relating to Governor Mandel's knowledge of the ownership of Marlboro.

We have previously set forth the law applicable to the mail fraud counts of the indictment. Based upon the indictment and record in this case, Appellants could have been convicted of mail fraud only if one or more of the following schemes to defraud were proven: a scheme involving the bribery or attempted bribery of Governor Mandel; or, a scheme involving the fraudulent misrepresentation of facts to, or such concealment of true facts from, the Maryland General Assembly and the Maryland Racing Commission for the purpose of obtaining legislation, racing days, and other things financially beneficial to those interested in Marlboro and later Bowie.

In its charge to the jury on the mail fraud counts of the indictment, the district court did not instruct the jury on the law of bribery. The terms bribe, bribery, and in return for were not defined for the jury. As we said in *United States v. Arthur*, 544 F.2d 730, 734, 735 (4th Cir. 1976), "not every gift, favor or contribution to a government or political official constitutes bribery. . . . 'Bribery' imports the notion of some more or less specific *quid pro quo* for which the gift or contribution is offered or accepted. . . . The crucial distinction between 'goodwill' expenditures and bribery is . . . the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary." We think that it was necessary for the district court to give *Arthur* type instructions in its charge to the jury on the mail fraud counts.[13] It is indisputable that based upon the

[13] Such an instruction was proffered with regard to mail fraud counts of the indictment, but was refused by the district court. It did give a similar instruction in connection with the racketeering counts.

allegations contained in the indictment[14] and evidence adduced at trial the jury could have premised Appellants' convictions of mail fraud on a finding that a scheme to defraud involving bribery existed. The failure by the district court to instruct the jury on the distinction between legally innocent benefits and bribes in the context of the mail fraud counts leads us to the conclusion that the jury may easily have been misled. If the jury found no bribery, it could not have convicted on that theory, although it might have on the alternate theory of furnishing false facts or concealment of true facts, as we have discussed earlier.

Appellant Mandel also contends that the district court erred in refusing to instruct the jury of the necessity of finding that he had knowledge that some or all of the other Appellants were the true owners of Marlboro Race Track at the time the racetrack legislation was before the Maryland General Assembly before the jury could find him guilty of mail fraud. The point is well taken, although the proffered instruction is too broad on its face.

We think it was necessary for the jury to be charged that Governor Mandel could not be convicted under § 1341 for engaging in a scheme to defraud that involved the fraudulent misrepresentation of facts to, or such concealment of material information from, the 1972 Maryland General Assembly, without first finding that he knew that some or all of the other Appellants were among the true owners of Marlboro Race Track during the 1972 session of the Maryland General Assembly. The gist of this part of the case was that Governor Mandel and the other Appellants misrepresented or concealed the names of the true owners of Marlboro from the Maryland General Assembly during its 1972 session for the purpose of obtaining legislation financially beneficial to Marlboro. If Governor Mandel

[14] The district court, in summarizing parts of the indictment, specifically informed the jury of one of the bribery allegations contained in the mail fraud counts of the indictment.

did not know who any of the real owners of Marlboro were during the 1972 legislative session of the Maryland General Assembly, he could hardly have participated with specific intent, in the context of this case, in a scheme to defraud that involved the misrepresentation or concealment of the names of the true owners of Marlboro from the Maryland General Assembly. No similar question is raised with respect to the Racing Commission.

III

Appellants also argue that the trial court committed error by allowing the government to introduce certain parts of the Maryland Code of Ethics (found in Annotated Code of Maryland, 1977 repl. vol. p. 568) into evidence to prove circumstantially an intent to defraud on the part of Governor Mandel. The government made use of the Code in its cross-examination of him, and the Code was available to the jury during its deliberations. The prosecutor described it as a "significant piece of evidence," and also stated that to describe its impact as "devastating" . . ."would not be too far off the mark." "Read it when you are in the jury room, take a look at it and see what it says," the prosecutor argued to the jury in his closing argument.

Appellants' argument centers on the fact that the Code of Ethics did not apply to Mandel as governor. The parties agree on that, and the jury was so instructed; however, the jury was instructed it might look to the Code to determine whether "Defendant Mandel acted with intent to defraud." The government contends, and the trial court agreed, that the Code is relevant and admissible as circumstantial evidence to show an intent to defraud. Several arguments have been advanced on this point. The initial trial judge discussed the issue when ruling on a motion to strike references to the Code of Ethics in the indictment. *United States v. Mandel*, 415 F. Supp. 997, 1008-09 (D. Md. 1976). He granted this motion, but held that his action had no effect on the government's ability to

proceed with its case since it was not necessary to show a violation of state laws or regulations to obtain a conviction under the mail fraud statute. The court went on to discuss the potential admissibility of the Code at trial to show an intent to deceive, and concluded that the final answer to this question would depend upon the other evidence introduced at trial.

The court based its argument on an analogy to the admissibility of violations of "commonly accepted standards of honesty and fairness" to show intent. But, in its previous discussion of these common standards the court clearly bottomed its argument on the fact that a violation of these standards would be "fraud" cognizable under the mail fraud statute; and further, as a matter of general criminal law, a jury could infer an intent to defraud based on the acts which make up the crime itself. The analogy breaks down at this point. The Governor of Maryland is a public trustee, and thus owes a fiduciary duty to the people of Maryland. See *The Declaration of Rights of the Maryland Constitution,* Art. 6, *Kerpelman v. Board of Public Works,* 261 Md. 436, 276 A.2d 56 (1971) (Article 6 sets forth the well-established doctrine that the duties of public officials are fiduciary in character and are to be exercised as a public trust). While violation of commonly accepted standards of fairness might very well constitute a breach of a fiduciary's duty and thus apply to Governor Mandel, the same is not true with respect to the Code of Ethics. The Code clearly does not apply to the Governor of Maryland — the Code proscribes not only impropriety, but the appearance of it, a matter the Maryland legislature has left to the polls rather than the courthouse for decision in the case of elected officials. We do not think that a breach of an inapplicable Code of Ethics should give rise to a violation of federal criminal law. This is especially true in the case before us since the intent of Governor Mandel is one of the principal factual issues in the case.

We have considered a similar issue tangentially in *United States v Morlang,* 531 F.2d 183, 191 (4th Cir. 1975). *Morlang* involved the bribery of a federal official, and as part of the jury instructions the district judge read portions of the "Standards of Conduct" which described the conduct and responsibilities of employees of the Department of Housing and Urban Development. We held that the judge was correct in instructing the jury on the specific standards in the HUD regulations, but that it was error to instruct the jury on the broad general precepts found therein. For example, the HUD Standards placed a duty on the defendant "not to 'impede Government efficiency or economy' . . . or 'affect adversely the confidence of the public in the integrity of the Government . . .'" 531 F.2d at 192. These general standards were held to be "too indefinite and vague to be a part of our criminal law." Id. Thus in *Morlang,* we excluded admittedly applicable standards because they were too vague to support a violation of the criminal law. In our case, the trial court admitted specific standards into evidence, but these standards were admittedly inapplicable to the defendant. We feel, however, that the same principles should apply in both cases. If the Code cannot be used to define Mandel's duties as governor, we do not think it is admissible here to show an intent to defraud.

Even assuming the admissibility of certain narrow parts of the Code, the broad reach of the parts that were admitted, which the government specifically requested the jury to read, are subject to the same infirmity as the objectionable regulations in *Morlang.*

We note our ruling on this issue will not necessarily, or even probably, affect the admissibility of evidence on retrial,[13a] for measured against the applicable standard of the Maryland Constitution, or the general law of fraud, the relevance of evidence now in the record would not be much different, if any. But, to repeat, we do not think admittedly inapplicable standards of conduct had

[13a] Other than the Code itself.

a proper place in the trial, especially when perfectly valid standards existed.

IV

As the central part of its case, the government attempted to prove that Governor Mandel took certain positions on racetrack legislation in return for gifts he received from the other defendants. Specifically, the government alleged that Mandel failed to oppose efforts to override his veto of a bill which would have given Marlboro, which was owned by several of the defendants, additional racing days; and that he supported a racetrack consolidation bill which would have allowed Marlboro, a half-mile track, to run racing days at a one-mile track, and thereby greatly increase its profitability. As part of its proof on both of these points, the government introduced testimony of several Maryland state senators who were present during the lobbying and voting on these two bills. Defense counsel raised repeated and continuing objections to this testimony on the grounds that it violated the rule against hearsay, it was not based on first-hand knowledge, it was irrelevant, and that it constituted an improper inquiry into legislative motive.

The district court held that the evidence was admissible under Federal Rule of Evidence 803(24), the catch-all exception to the hearsay rule. We do not agree. We have reviewed the testimony of the state senators, and while portions of the testimony may be admissible, a part must be excluded because it violates the rule against hearsay and the rule requiring personal knowledge. While the relevance of a part of the testimony is doubtful, we believe that some relevance problems can be cured by cross-examination. The types of testimony given by the senators can be divided into several more or less discrete categories. The testimony of an individual senator may fall within several of these categories, and thus for purposes of our review we feel that an analysis by category is more appropriate than a witness-by-witness discussion.

With regard to the racetrack consolidation bill, at least one senator testified to the substance of meetings he had with Governor Mandel and statements made by Mandel during the meetings. This evidence is admissible as a statement by a party-opponent, and, indeed, it is not considered hearsay as that term is defined in the Federal Rules of Evidence. FRE 801(d)(2)(A). On this theory, statements by Governor Mandel's agents concerning the Governor's views on the veto override also are admissible. FRE 801(d)(2)(D). A question here, of course, is who were Governor Mandel's agents. His legislative aides (employees, not members of the senate) were his agents, and their statements on Governor Mandel's views were within the scope of the agency relationship. However, it is equally true that Senator Staten was not Mandel's agent, and the substantial testimony by others relating Staten's statements of Governor Mandel's views would not be admissible. The government attempted to prove that Staten was one of Mandel's chief spokesmen on the Senate floor, but the trial court ruled that this did not establish an agency relationship. This ruling was not clearly erroneous.

Several senators also testified to certain non-verbal conduct by Mandel's legislative aides, particularly with regard to the degree of their lobbying efforts on these two bills. This evidence was offered to prove the presence or absence of lobbying on particular bills which in turn was used to infer Mandel's position on the legislation. Under the Federal Rules of Evidence, this evidence is not hearsay, and is admissible if relevant. FRE 801(a) and (c). While the probative value of this evidence may be arguable, we are not prepared to say that it is irrelevant since the degree of lobbying by Governor Mandel's agents may bear some relationship to the position the Governor takes on a specific bill. A problem is that the presence or absence of lobbying activity may be due to any number of reasons unrelated to Governor Mandel's support for a particular piece of legislation; and, it is one thing to say that the Governor supported or approved a bill, and quite another to say

he did so in return for a bribe. If such conduct is entirely unrelated to the legislative question, of course it should be excluded; however, we feel that any weakness in such evidence can usually be remedied by cross-examination, and that its relevance is ordinarily a matter of discretion for the trial court.

We now turn to that portion of certain senators' testimony in which the witness testified to statements of Governor Mandel's position made by declarants other than Governor Mandel or his agents. Important testimony of this type was given by senators who testified to statements made by Senator Staten. Also important, however, were statements by unidentified declarants, statements relating to the general discussion among the senators, statements concerning discussions with other senators, and testimony by one senator relating the feelings of other senators.

This case does not require an exhaustive review of the history and purposes behind Rule 803(24). It should be noted, however, that the rule was not designed as a broad exception and does not give the trial judge unfettered discretion to admit otherwise inadmissible hearsay. The rule is designed to fill in omissions of other exceptions and to allow for the development of new general exceptions to the rule. See Advisory Committee Notes to Rule 803(24). A proponent of evidence under this rule must satisfy five requirements before evidence will be admitted: (1) the proffered evidence must have "circumstantial guarantees of "trustworthiness" equivalent to evidence admitted under established hearsay exceptions; (2) the statement must be "offered as evidence of a material fact", (3) "the statement [must be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; (4) the general purposes of the rules and the interests of justice will "best be served by admission of the statement into evidence"; and (5) the proponent must give the opposing party adequate notice that this

exception will be used, "including the name and address of the declarant."

The evidence offered by the government does not meet the requirements of this exception.

With respect to those statements where the declarant is unidentified, the government has not met the notice requirement because the names and addresses of the declarants were not given. The government argues that the possible declarants are limited to the members of the Maryland Senate, but we do not believe this argument meets the letter or spirit of Rule 803(24). The rule, in terms, requires the proponent to give the name and address of the declarant, and given the general proposition that the rule is not to be construed broadly, we see no reason to depart from its plain requirements.

We also do not believe the evidence in question possesses the guarantees of trustworthiness required by Rule 803(24). The government argues that since several senators testified on this point, that sheer numbers lends credibility to their testimony. Second, the argument goes, the declarants, although at times unidentified, are limited to a discrete group, nearly all of whom were available to the defense as witnesses. Third, the government points out that the senators were testifying about events uniquely within their expertise as senators and that this adds to the overall trustworthiness of their testimony. Finally, the government states that the evidence is crucial to its case because of the difficulties of proof inherent in cases of this type.

We are not persuaded by the government's arguments. First, the senators who testified all say that someone else said that Governor Mandel did not care whether his veto was overridden. No senator seems to have testified that Governor Mandel told him that the Governor did not care. Important also is the whole setting from which this testimony is drawn. We are dealing with a purely legislative political scene. Some of the most damaging hearsay statements were repeated

by long-time political enemies of the Governor. Further, the statements were made on and around the senate floor in the heat of political battle, where rumors, opinion and gossip abound. We are not dealing with an objectively observable factual event. We are dealing with circumstantial proof of the position a governor took on two pieces of legislation. Evidence based on rumors and general discussions is the worst type of hearsay. Such testimony, especially from unidentified declarants, does not possess the requisite guarantees of trustworthiness to justify a new exception to the hearsay rule.

We also do not feel that the purposes behind the Federal Rules of Evidence or the interests of Justice justify admitting this evidence. In a criminal case we must be careful that a conviction is not based on speculation. When combined with arguably relevant non-verbal evidence of acts by Governor Mandel's agents discussed above, the hearsay admitted by the trial court must have been quite prejudicial to the defendants.

A final category of testimony involves the distinction between the rule against hearsay (FRE 802) and the rule requiring personal knowledge (FRE 602). Senators who were present testified to their own general feelings or beliefs as to Governor Mandel's position on the veto override. While this testimony is not hearsay in form, the feeling and beliefs expressed therein were often based in whole or in part on impermissible hearsay. To the extent it was based on hearsay, this testimony is inadmissible because the witness lacked the requisite first-hand knowledge.

FRE 602; *McCormick On Evidence* §§ 10, 247. While the distinction between such evidence and hearsay is sometimes formal, and the line between the rules often is blurred in practice, the rules do demonstrate that testimony based on hearsay is equally inadmissible as direct hearsay testimony. Therefore, if a senator testified that he did not believe that Governor Mandel

wanted his veto overridden, and if that belief were based on inadmissible hearsay statements, then the senator lacks any personal knowledge of the event and his testimony should have been excluded.

The more difficult problem arises when the witness' belief[15] is based in part on admissible testimony. We think this problem is one of degree. If the belief is primarily based on hearsay, it is inadmissible. But, if the belief is substantially based on admissible evidence, such as direct statements or acts by one of Governor Mandel's agents, then it should be admitted. The basis for the belief should be explored in each instance and a ruling on admissibility made when those facts are before the trial court.

Our discussion above is admittedly quite general. However, as explained, substantial portions of the senators' testimony is inadmissible. We have examined the more notable examples to provide the trial court with some guidance for the new trial which must be granted on this and other grounds.

We do not believe the testimony elicited was an impermissible inquiry into legislative motive. The questions before the court were what actions, if any, Governor Mandel took with respect to the two pieces of legislation, and his motive for any acts, not the motive of the legislature, which was only at issue tangentially, if at all. The statements in *Fletcher v. Peck,* 6 Cranch 87 (1810), and *Tenney v. Brandhove,* 341 U.S. 367 (1951), that legislative motive may not be inquired into, do not apply in this case.

V

Defendant Cory argues that the trial court committed error by restricting the impeachment of Katherine O'Toole, a former secretary in his office and a key government witness against him. Cory had called a former co-worker of O'Toole's to testify as to her opinion

[15] We have assumed the admissibility of the belief of the senators, no question being made of it.

of O'Toole's character with respect to truth and veracity.

While the record is not exactly clear as to the exact reason for the restriction of the impeaching testimony, whether for an insufficiently detailed foundation being laid, or because the limitation to the community in which O'Toole lived, we think a broader scope should have been allowed.

Rule 608(a) changed the common law rule which would admit only knowledge of reputation for truth and veracity as impeaching evidence under the circumstances present here. The rule now permits either knowledge of reputation for truth and veracity or opinion thereof, which the rule calls "character for truthfulness or untruthfulness."

This is made clear by the Senate amendment, adding "opinion or", which was adopted by the conference committee. See Redden & Salsburg, *Federal Rules of Evidence Manual,* p. 173 et seq. So the inquiry under the new rules is not limited as heretofore to knowledge of reputation for truth and veracity, but also may include opinion of character for truthfulness or untruthfulness.

We also think there should be no restriction necessarily limited to the community in which the witness sought to be impeached lives, and that the realities of our modern, mobile, impersonal society should also recognize that a witness may have a reputation for truth and veracity in the community in which he works and may have impressed on others in that community his character for truthfulness or untruthfulness. Therefore, we believe the community in which the witness worked, the law office of Cory in this instance, was a proper locality in which to prove O'Toole's reputation or character for truthfulness or untruthfulness. We do not imply that such character in the community in which she lived might not have been proved. Both *McCormick on Evidence, 2d Ed.* § 44, and *Wigmore on Evidence, Chadbourn Rev. 1974,* § 1616, take this view.

Finally, we think the trial court should have considerable discretion in determining whether the impeaching witness is qualified to speak on the subject; for example, how well the impeaching witness knows the witness sought to be impeached, under what circumstances, etc. We do not think the district court abused its discretion in that respect.

On retrial, our opinion here should govern efforts to impeach Katherine O'Toole.

VI

Defendant William A. Rodgers argues that due to the disparate weight of the evidence against him as compared to the other defendants, and because of the potential for confusion between William A. Rodgers and his brother, co-defendant Harry W. Rodgers, III, he should have been granted a severance from the other defendants pursuant to FRCrP 14. Generally, persons who are indicted together should be tried together. *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971). This rule is especially important when one crime may be proven against two or more defendants on the same evidence. Id. This general preference must give way, however, when a particular defendant demonstrates that joinder will prevent him from receiving a fundamentally fair trial. The determination of whether joinder is prejudicial generally is left to the discretion of the trial court, and an appellate court should not order severance of defendants properly joined under FRCrP 8 unless the trial judge has abused his discretion. *United States v. Chramek,* 331 F.2d 380 (4th Cir. 1964), cert. den. 379 U.S. 822 (1964). We have reviewed William Rodgers' claim in this case and do not think the trial court was in error. Severance will not be granted when the claim is based on the disparity of evidence adduced against individual defendants without a strong showing of prejudice, not present here. *United States v. Smolar,* 557 F.2d 13, 21 (1st Cir. 1977), cert. den. 434 U.S. 971 (1977). Any prejudicial confusion caused by the fact that two of the defendants were brothers was eliminated by the instructions given by the trial court.

VII

Should the improperly admitted evidence be removed from the case, and the jury instructed properly, the question may be put as to whether the government has presented legally sufficient evidence to sustain a conviction. We should note that while it is clear that each defendant has questioned the sufficiency of the evidence with respect to his individual participation, it may be argued that they have not appealed as a group from the denial of their motion for judgment of acquittal based on the insufficiency of the evidence to support a finding of a scheme to defraud. However, we need not pass on that matter, because for the reasons stated below, we do not reach the question of the sufficiency of the evidence as to any individual case or count, or as to the case taken as a whole.

28 U.S.C. § 2106 gives the Courts of Appeals broad remand powers, including the entry of "appropriate" judgments or "further proceedings" that may be "just under the circumstances." In *Bryan v. United States,* 338 U.S. 552 (1950), the Supreme Court interpreted § 2106 broadly and held that it authorized a remand for a new trial where a conviction was reversed solely due to the insufficiency of the evidence. After *Bryan,* the federal courts used their § 2106 power in a wide variety of settings when there was a finding of evidentiary insufficiency. E.g., *Forman v. United States,* 361 U.S. 416 (1960) (new theory of the case by government); *United States v. Parks,* 460 F.2d 736 (5th Cir. 1972) (insufficient proof to rebut prima facie case of insanity); *Fielding v. United States,* 251 F.2d 878 (D.C. Cir. 1958) (government may be able to introduce better evidence at retrial); *United States v. Dunn,* 299 F.2d 548 (6th Cir. 1962) (trial error including inadmissible evidence); *United States v. Patterson,* 422 F.2d 1204 (4th Cir. 1970) (intervening change of law). And, by analogy, it has been held, correctly we think, that if a new trial must be granted for other reasons, the sufficiency of the evidence issue need not be reached. E.g., *United States v. Fiore,* 443 F.2d 112 (2d Cir. 1971), cert. den. 410 U.S. 984 (1973); *United States v. Garguilo,* 310 F.2d 249 (2d Cir. 1962).

In *Fiore,* Bennett, a key government witness who had testified before the grand jury, refused to take the testimonial oath and refused to answer any questions at trial. The trial judge granted the government's request to examine Bennett as a hostile witness, and the prosecutor then questioned him by reading directly from Bennett's former grand jury testimony. The court reversed, and held that admitting this evidence violated the rule against hearsay and the confrontation clause of the Sixth Amendment. 443 F.2d at 115. Fiore also had moved for dismissal of the indictment, arguing that there was insufficient evidence to support the jury's verdict. The court denied this motion, saying:

> We are by no means certain that, in the absence of any significant evidence by the defense, the testimony of the agents was not sufficient to take the case to the jury. Furthermore, no one can be sure that Bennett's attitude at a second trial will be the same as at the first. The record does not disclose the length of his New York sentence; as he approaches the end of it or if he is now or soon becomes eligible for parole, the prospect of a federal sentence for contempt may have a more chastening effect. If this does not happen, it is not beyond possibility that the Government may be able to establish that Bennett's recalcitrance was due to "the suggestion, procurement or act of the accused." 443 F.2d at 116.

Thus, while the court felt that the evidence might be sufficient to send the case to the jury, it did not feel required to answer the question since the circumstances warranted a new trial in any event.

The same court used the same technique in *Garguilo, supra,* where a conviction was reversed due to an incorrect jury charge on aiding and abetting. In

refusing to pass on the sufficiency of the evidence, it said:

> If the evidence against Macchia passed the test of sufficiency applicable to a criminal case, it did so, as was said in United States v. Lefkowitz, supra 284 F.2d at 315, "only by a hair's breadth". We are not here required to make so fine a judgment, since we believe reversal for a new trial to be called for in any event. 310 F.2d at 254.

Of course, the proceedings authorized by Congress in § 2106 are limited by the Constitution, and it has been argued that the practice of remanding for a new trial after a finding of insufficient evidence violates a defendant's rights under the double jeopardy clause of the Fifth Amendment. In *Bryan v. United States,* 338 U.S. 552 (1950), the Supreme Court rejected this argument, although later cases may not be in entire agreement as to the rationale for this result. See *Sapir v. United States,* 348 U.S. 373 (1955) (Justice Douglas concurring); *Yates v. United States,* 354 U.S. 298 (1957); *Forman v. United States,* 361 U.S. 416 (1960). These ambiguities were discussed and to some extent resolved last June in *Burks v. United States,* No. 76-6528, 46 U.S.L.W. 4632 (June 14, 1978). The issue presented in *Burks* was "whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict." The Court held that a retrial under these circumstances would violate the double jeopardy clause, and that this result did not depend in any way on whether the defendant had asked for a new trial as part of his claim for relief. 46 U.S.L.W. 4636. The Court was careful to point out that the decision in no way questioned prior holdings which allow a retrial when a conviction is reversed due to trial error. 46 U.S.L.W. at 4635. Thus, after *Burks,* two propositions are clear: 1) if a conviction is reversed solely due to evidentiary insufficiency the double jeopardy clause requires that the court of appeals cause the entry of a judgment of acquittal; and

2) if a conviction is reversed solely due to trial error, then retrial is constitutionally permissible.

The remaining question is whether a new trial may be ordered when questions going to trial error as well as evidentiary insufficiency have each been raised on appeal. In a case decided the same day as *Burks,* the Court left a similar question open. *Greene v. Massey,* No. 76-6617, 46 U.S.L.W. 4636 (June 14, 1978). In *Greene,* the petitioner's conviction was reversed and remanded for a new trial by the Florida Supreme Court, but it was not clear whether a majority of that court had based its decision on trial error or evidentiary insufficiency. The per curiam opinion reversed for insufficient evidence, but three of the four judges who joined this opinion concurred in an opinion which only discussed the trial error in admitting hearsay evidence. Thus, it was not clear if the three concurring judges agreed only with the result of the per curiam opinion — new trial, or whether they felt that after the hearsay evidence was excluded insufficient evidence remained to support a conviction. The United States Supreme Court remanded the case for a determination of which alternative reading was correct and expressly reserved the question of the double jeopardy consequences if the reversal was because the legally competent evidence was insufficient to prove guilt. 46 U.S.L.W. at 4638, n.9.

Our question is similar to the one left open in *Greene.* When the inadmissible evidence is removed from consideration, it is arguable there is insufficient evidence to support a conviction on at least some theories of the case. This problem is exacerbated by the fact that the jury was instructed incorrectly and thus its verdict may not have been based on applicable law.

The double jeopardy clause serves to protect a defendant against multiple prosecutions, but it must be remembered that society has a "countervailing interest in the vindication of criminal justice," and that both the state and the defendant have an interest in an error free determination of the merits of the case. *Green v.*

United States, 355 U.S. 185, at 219 (1957) (Justice Frankfurter dissenting). These competing interests appear to be at the core of the distinction between the double jeopardy consequences of a reversal for trial error and insufficient evidence.

When an appellate court determines that the evidence presented to the jury was legally insufficient to support a conviction, it is holding that the government's case was so weak that it should not have gone to the jury, or that a judgment of acquittal should have been granted after the jury returned its verdict. When the evidentiary insufficiency is the sole issue on appeal, it has been forcefully argued that the government has had its chance and should not be allowed another trial. Since no trial error occurred (the sole issue being evidentiary sufficiency), a retrial would give the government a second opportunity to prove the identical point at issue in the first trial. This, of course, was the situation present in *Burks*.

When a conviction is reversed for trial error, however, different considerations are involved. In cases where the sufficiency of the evidence has not been questioned, no problem is presented, for the error is procedural only, although it may be of constitutional dimension. The hard question is whether an appellate court must decide the question of the sufficiency of evidence if it has been presented in a case which would have to be reversed in all events for procedural error. We are of opinion that ordinarily an appellate court should not be required to decide that question, although we can envision the extraordinary case which might demand it. In many cases, such as the one at bar, with a vast volume of evidence, it would be doing a distinct disservice to the defendants to decide on appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. Among other things, this rather invades the province of the jury and the trial court on retrial. The jury is the proper trier of the facts, including the credibility of witnesses and the inferences

to be drawn from the testimony. Perhaps the faulty evidence was the key to the jury's decision; perhaps it was not. Who can say? Certainly not a court of appeals which has neither seen the witnesses nor heard them testify.

Another reason for not requiring an appellate court to adjudge the sufficiency of the balance of the evidence, when a part of the evidence has been improperly admitted, is that it is impossible to say what other evidence the government might have produced had the faulty evidence not been admitted, and what theory of the case the government might have principally pursued had it been presented in the context of different evidence before the jury.

Thus, we believe it does a service neither to the defendants nor to the government to adjudicate the sufficiency of the balance of the evidence when important evidence has been ruled to be inadmissible. To do so, it would be necessary to some extent to set ourselves up as triers of fact, which should be avoided, if possible. As well, we would be required to speculate as to whether or not the government would have conducted the prosecution in any different manner had the faulty evidence been excluded.

We do not, then, pass upon the sufficiency of the evidence in this case, leaving that question in the first instance to the trial court and jury on retrial.

VIII

After the jury returned its verdict, the district judge entered a judgment of acquittal on Count 23, a racketeering charge under 18 U.S.C. § 1962(c) in favor of Hess, Harry W. Rodgers, III, and William A. Rodgers. Section 1962(c) states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's

affairs through a pattern of racketeering activity or collection of unlawful debt.

The trial judge ruled that the "conduct or participate" language in the statute required "some involvement in the operation or management of an enterprise," and found that the government's evidence had not met this requirement. He therefore entered a judgment of acquittal. The government appeals from this judgment and argues that the trial court erroneously construed the statutory requirements.

The first issue is whether the government has a right to an appeal in this setting. Several recent Supreme Court cases have articulated the general principle that the government cannot appeal from an acquittal, either by jury or judge, when a new trial or further fact finding proceedings would be required if the government were to be successful. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Thus, the double jeopardy clause has been construed to protect against successive trials, and not to bar all appeals by the government. If the jury's guilty verdict can be reinstated if the government prevails, then double jeopardy does not bar the appeal from a judgment of acquittal. *United States v. Wilson*, 420 U.S. 332 (1975). Two recent opinions may have cast some doubt on this analysis by emphasizing the finality of acquittals as a reason for barring government appeals from any judgment of acquittal. See *Sanabria v. United States*, 46 U.S.L.W. 4646 (June 14, 1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 576 (1977) (Justice Stevens concurring). However, despite these indications, the statement in *Wilson* has never been repudiated, and, indeed, the court has declined to repudiate it, in subsequent recent decisions. *United States v. Scott*, 46 U.S.L.W. 4653, 4655 n.7 (June 14, 1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977). Our circuit has analyzed the effect of *Martin Linen Supply* on *Wilson* and, on facts identical to the case at bar, we held that the statement in *Wilson* was unaffected by

Martin. United States v. Burroughs, 564 F.2d 1111 (4th Cir. 1977). Therefore, we are constrained to follow circuit precedent which allows the government to appeal from a judgment of acquittal entered after the jury has returned a guilty verdict. Other circuits have reached the same result. *United States v. Allison*, 555 F.2d 1385 (7th Cir. 1977); *United States v. Cahalane*, 560 F.2d 601 (3d Cir. 1977); *United States v. Donahue*, 539 F.2d 1131 (8th Cir. 1976).

Turning to the merits, the district judge held that the "conduct or participate" language in § 1962(c) required some involvement in the operation or management of the business, and that on the facts of this case the transfer of the partnership interest from Hess to Mandel did not meet this requirement. His opinion was based largely on the legislative history to Title IX of the Organized Crime Control Act of 1970, particularly the repeated use of the word "operation" in describing the purpose of § 1962(c). See U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. 4007 et seq. (1970). For example, the legislative analysis of Title IX (now 18 U.S.C. § 1961 et seq.) begins with the following statement:

> "This title creates a new chapter in title 18, entitled 'Racketeer Influenced and Corrupt Organizations,' which contains a threefold standard (1) making unlawful the receipt or use of income from 'racketeering activity' or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce; (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeering activity,' and (3) proscribing operation of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeering activity.'" U.S. Code Cong. & Ad. News, supra, at 4010.

As the district court said: "A comparison of the language used above to describe Section 1962(c) with the language of Section 1962(c) indicates that the words 'operation of any enterprise' were meant to describe the

phrase 'conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs.'"

The district court also noted that the main purpose of Congress in enacting Title IX was to prevent the infiltration of legitimate business by organized crime. Thus, § 1962(a) prevents the use or investment of racketeering profits in any business which affects interstate commerce, and § 1962(b) prevents the acquisition of any business interest through a pattern of racketeering activity. Section 1962(c) may be viewed as complementing subsections (a) and (b) by covering the situation where a present owner or employee of a business begins to operate the business through a pattern of racketeering activity.

We have reviewed the legislative history of 18 U.S.C. § 1962(c) and have concluded that the district court was correct in its interpretation. We find additional support for its view in the use of the word "through" in the statute which would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business. Indeed, this connection must be shown if the word "through" is to have any meaning in the statute. Without the word "through", anyone who used income from a legitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c). We do not believe Congress meant to sweep so broadly, especially in light of the mandatory forfeiture penalties for a § 1962 violation. 18 U.S.C. § 1963(a).

The Seventh Circuit dealt with this question and held that a connection between the predicate offenses and the charged business must be shown. *United States v. Nerone,* 563 F.2d 836, 851 (7th Cir. 1977). The court agreed with the defendant's contention that:

> the Congressional use of the word "through" in § 1962(c) was not intended to be meaningless. They submit, correctly we think that the most logical definitions to ascribe to that word as used in the statute are "by means of, in consequence of, by reason of." See Black's Law Dictionary 1652 (Rev. 4th ed. 1968). Their fundamental contention, although we have somewhat paraphrased it, is that if the word "through" is to have operative meaning, the Government must offer some proof that the affairs of the charged enterprise were conducted through a pattern of racketeering activity or through collection of unlawful debt.
>
> . . . .
>
> The Government's case must fail because of a total want of proof of the connection between the racketeering activities and affairs of [the charged enterprise]. 563 F.2d at 851-52.

See also *United States v. Rubin,* 559 F.2d 975, 990 (5th Cir. 1977) (discussing but not deciding the issue). We are aware of the possibly contrary language in *United States v. Stofsky,* 409 F. Supp. 609, 613 (S.D.N.Y. 1973), aff'd 527 F.2d 237 (2d Cir. 1975). However, the issue in *Stofsky* was whether § 1962 was unconstitutionally vague, and the question before us was not before that court. The Second Circuit in affirming did not discuss the question.

Having determined that the district court was correct in its construction of § 1962(c), we now consider whether the evidence produced by the government against the defendants met the statutory requirement. Basically, the government proved that Hess transferred part of his interest in Security Investment Company to Governor Mandel, and that Hess mailed Mandel several checks representing Mandel's share of Security's profits. The district court held that this transfer did not establish the connection between the business and the predicate offenses required by § 1962(c). In support of its position, it noted that while Congress specifically outlawed the acquisition of a business through a pattern of racketeering activity it did not specifically proscribe the transfer of an interest in an enterprise. Second, transfer of an interest in a business is the antithesis of operating it. Third, the district court pointed out that Mandel's interest was purely passive, and that he was not

entitled to any management role and did not have any. Finally, the district judge distinguished the situation where the charged enterprise is merely a front for racketeering activity.

We agree with the opinion of the district court. There is no doubt that Security was a perfectly legitimate business, and the simple transfer of an ownership interest in that business does not constitute the conduct of the business through a pattern of racketeering activity even if the transfer is part of an alleged payoff in a mail fraud scheme. We see no difference between this transfer and the transfer of stock or any other business interest. The transfer may even be in payment for unconnected criminal activity as the government alleges here, but this fact does not, in itself, cause the business, the interest in which is transferred, to become a racketeer influenced organization proscribed by § 1962(c) absent other proof not present in this record.

We think the government's reading of the statute is impermissibly broad and is not supported by the legislative history or the language of the statute. We therefore affirm the judgment of acquittal on count 23.

IX

The convictions of the defendants on the other racketeering charges (Governor Mandel in Count 21) (Hess, Rodgers, William Rogers, Kovens, and Cory in Count 24) must also be vacated and remanded for a new trial for they depend in whole or in part upon the mail fraud convictions.

Conclusion

The judgments of acquittal on Count 23 of the indictment are

Affirmed.

The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are

Vacated and remanded for a new trial.

It follows that the order of forfeiture is also

Vacated and remanded.

BUTZNER, Circuit Judge, dissenting:

The trial of this lengthy case required the able, experienced district judge to whom it was specially assigned to make many rulings involving the admission and exclusion of evidence and to explain to the jury in clear and concise terms the principles of law on which both the prosecution and the numerous defendants relied. To do justice to both sides, he had to exercise in full measure the discretion entrusted to a trial judge. Such discretion, of course, is not unbridled. Its exercise must be firmly grounded on pertinent law and rules of court. But even when a trial judge faithfully adheres to these constraints, he must necessarily exercise judgment in applying the stark letter of the law to the facts that are the subject of controversy. My study of the record convinces me that the trial judge responsibly discharged this duty. I find no cause for reversal in the numerous assignments of error that question the exercise of his discretion. Consequently, I would affirm the convictions. Parts I through IV deal with those issues on which my brothers and I differ. Part V discusses briefly the appellants' contention, which my brothers do not decide, concerning the sufficiency of the evidence.

I

The appellants assign error to the district court's refusal to give two of their proffered jury instructions. In assessing these claims of error, we must recognize that the district court has substantial discretion as to the wording of specific instructions. *United States v. Garcia,* 562 F.2d 411, 416 (7th Cir. 1977). Whether the jury was properly instructed can only be determined from reading and considering the charge as a whole. 2 Wright & Miller, Federal Practice & Procedures § 485 at 297 (1969); *see, e.g., United States v. Garrett,* 574 F.2d 778, 781-82 (3d Cir. 1978). I believe that the charge in this case was well within the scope of the district court's allowable discretion.

First, the appellants challenge the court's refusal to give an instruction in connection with the mail fraud counts which would have defined bribery in accordance with United States v. Arthur, 544 F.2d 730, 734-36 (4th Cir. 1976). They assert that this omission may have allowed the jury to confuse legally innocent benefits with bribes and to premise the mail fraud convictions on that confusion.

In fact, the court fully complied with *Arthur.* The court charged the jury as follows:

> The Government contends that Defendants Hess, Harry and William Rodgers bribed Mandel by giving him a four-ninths interest in Hess 9 percent interest in the Security Investment Company in order to influence him in the performance of his official duties. Defendant Mandel and Hess contend that Hess assigned only an interest in the income of Security Investment Company to Mandel for the purpose of paying legal fees earned by Defendant Mandel before he became Governor. They deny such interest was a bribe.
>
> Defendants William Rodgers and Harry Rodgers contend that they had no involvement in this transaction; that it was purely a personal matter between Hess and Mandel.

> The Government further contends that Hess, Harry and William Rodgers bribed and attempted to bribe Marvin Mandel by transferring to him a 15 percent interest in certain assets later formally acquired by Ray's Point, Inc., in order to influence him in the performance of his official duties; that Mandel received such interests without [in]curring any personal liability on the note or notes signed by some of the purchasers of the property including Hess, Harry and William Rodgers.
>
> Defendants Mandel, Hess, Harry and William Rodgers contend that this was a legitimate business transaction, that Mandel paid for his interest in Ray's Point, Inc., and that the transaction complied with the law in every respect.
>
> Bribery imparts the notion of some more or less specific quid pro quo. Quid pro quo means the giving of something in exchange for something else. Not every gift, favor [or] contribution made to or received by a public official constitutes bribery. The crime of bribery occurs only if the gift or favor is coupled with a particular criminal intent. The crime of bribery requires that there be a gift or favor received by a public official as a quid pro quo. This requirement would be satisfied if the jury were to find beyond a reasonable doubt a course of conduct or favors flowing to a public official in exchange for an official act, or in exchange for a pattern of official actions favorable to the donor even though no particular gift or favor is directly connected to any particular official act. This requirement would also be satisfied if a gift were made or a favor were done upon the condition that the public official act favorably to the donor when necessary.
>
> As to a public official, the requisite intent is not supplied merely by the fact that he received a gift or favor with knowledge that it was motivated by some generalized hope of some ultimate benefit on the part of the donor. It is necessary to the crime of bribery that the public official received the gift or favor with knowledge that the benefits were conditioned upon his performance of an official act,

a pattern of acts, or an express or implied agreement to act favorably to the donor when necessary and with intent that he be so influenced in the performance of his official duties.

As to the donor, the requisite intent is not supplied by the fact that he was motivated by making the gift or doing a favor by some generalized hope of some ultimate benefit on his part. The practice of promoting a favorable social climate by making gifts or doing favors for a friend does not amount to bribery if motivated by friendship alone, and no official action is expected in return.

A legitimate good faith business transaction not involving the giving of something of value in exchange for official action is not a bribe. The crime of bribery requires that something of value be given to a public official in exchange for or as compensation for official action. Thus, a distinction between conduct that constitutes the crime of bribery and conduct that does not is the existence or nonexistence of criminal intent that the benefit be received by the public official in exchange for some official act, a pattern of acts, or an expressed or implied agreement to act favorably to the donor when necessary.

This explanation faithfully conforms to *Arthur*. The court also repeatedly stressed the legal requirement of a quid pro quo when discussing the contentions of the individual defendants. The appellants stress, however, that the quoted instruction defining bribery was given in connection with the racketeering counts of the indictment and argue that it should also have been given in connection with the mail fraud counts.

Repetition of the instruction was unnecessary. The government relied on proof of the same gifts to Mandel, and the same favors he bestowed, to prove both the mail fraud counts and the racketeering counts. Hence, there is no basis for finding that Mandel was prejudiced by the court's refusal to repeat the instruction. The

appellants cite no authority requiring the court to repeat instructions when the government offers the same evidence to prove more than one offense in a multi-count indictment. Indeed, we have held that "[r]epetitious and unnecessarily long charges are confusing to a jury and prevent it from exercising its function." *United States v. Salliey*, 360 F.2d 699, 702 (4th Cir. 1966). The court properly exercised its discretion by declining to give the repetitive instruction.

Second, Mandel contends that the district court erred in refusing to instruct the jury that

> [a]ctual knowledge that some of the co-defendants had purchased Marlboro Racetrack and owned its stock during the 1972 session of the Maryland General Assembly is an essential element of the offense charged against the Defendant Mandel in this case.

The judge accepted this as a proposition of law, but he found it unnecessary to instruct the jury in these precise terms.

The judge instructed the jury that a scheme to defraud is a necessary element of a mail fraud offense and that a scheme to defraud involves "intentional use of false or fraudulent representations." He also told the jury that Mandel could not be convicted of mail fraud unless he had knowingly participated in the scheme to defraud alleged in the indictment. He emphasized this by explaining: "The purpose of adding the word 'knowingly' is to ensure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason." Elsewhere in the instructions, the judge fully explained the alleged scheme and set forth the government's contentions, which embraced proof that Mandel knowingly promoted the interests of his friends.

To prevent any possibility that the jury would be misled, the court explained in detail Mandel's contentions, including his claim that he knew nothing about the ownership of Marlboro during the 1972 session of

the General Assembly. Only by reading the charge as a whole can one appreciate the care with which the court charged the jury. The following extracts, however, will serve to expose the fallacy of this assignment of error. The judge told the jury:

> Defendant Mandel denies that he participated in any of the alleged unlawful activities allegedly engaged in by the other Defendants, or that he had any knowledge of such activities. He had nothing to do with any change of ownership in Marlboro in 1971. If anyone acquired an interest in Marlboro as nominee for another, such fact was not known to him. When it was represented to the general public and to others that a certain Eugene Casey headed the group which had purchased the track, Defendant Mandel accepted the representation as true. Mr. Hess and the Rodgers brothers actively and consciously withheld from him the fact that they had acquired ownership interests in Marlboro for fear that he would be concerned over possible political embarrassment.
>
> Mandel further says that he did not, along with the other Defendants or anyone else, fraudulently conceal from the Legislature the true identities of the owners of Marlboro.
>
> * * * * * *
>
> He says that alleged misstatements by others concerning the identities of the Marlboro stockholders were neither made by nor participated in by him, and that he had no knowledge that such statements were untrue. He says that Casey represented to him that Casey was the head of Marlboro and the leader of its new owners.

Furthermore, while discussing the contentions of Harry Rodgers, the court noted Rodgers claim that "Mandel was unaware of the other defendants' ownership of Marlboro until late 1972."

When the whole charge is considered, it is apparent that the court adequately explained to the jury that Mandel's knowledge of Marlboro's ownership was an essential part of proof that he participated in the scheme to defraud. The court also explained that if the jury had a reasonable doubt about any defendant's participation in the scheme, the jury would be obliged to acquit that defendant of mail fraud. Since the court fully instructed the jury on this issue, Mandel was not entitled to insist upon an instruction identical to his request. *See United States v. Westbo,* 576 F.2d 285, 288-89 (10th Cir. 1978); *United States v. Rothman,* 567 F.2d 744, 752 (7th Cir. 1977). The court was free to use its own language, so long as it adequately and correctly advised the jury of the material issues. *See United States v. Scheper,* 520 F.2d 1355, 1357-58 (4th Cir. 1975). The instructions were entirely within these bounds.

II

The appellants complain: "The court below abused its discretion in admitting evidence relative to the Maryland Code of Ethics and the motivations of the Maryland General Assembly." I will discuss these alleged incidents of abuse of discretion separately, treating first the assignment of error about the Maryland Code of Ethics.

Examination of pertinent extracts of the Code and consideration of the judge's charge to the jury dispel any notion that he abused his discretion with respect to this incident of the trial. In addition to a brief preamble, the following portions of the Code were introduced:

> Now, therefore, I, Marvin Mandel, Governor of the State of Maryland, by virtue of the authority vested in me as Governor and by Section 14A of Article 41 of the Annotated Code of Maryland (1957 Edition, 1968 Supplement) hereby promulgate the following Code of Ethics, effective immediately, applicable to all officers and employees of the executive branch of the State Government.

Article I.

Declaration of Policy

State officers and employees are responsible to all of the people of the State and not to any favored segment or group. The business and affairs of the State must be conducted in such an impartial manner that all persons understand that no State officer or employee can be improperly influenced. State officers and employees must avoid all situations where prejudice, bias, or opportunity for personal gain could influence their decisions. They must equally avoid circumstances suggesting that favoritism or personal gain is a motivating force in the conduct of State Government.

It is the intent of this Code to set forth the minimum ethical standards to be followed by officers and employees of the executive branch of the government. These standards are intended not only to require officers and employees to avoid activities that might result in using a public office or employment for private gain or the giving of favored treatment to any organization or person but also to maintain public confidence in the executive branch by prohibiting activities that might permit opportunity for personal gain or personal preference to influence decisions. The objectives are to maintain an impartial administration of the State government and to maintain public confidence in government.

Standards of Ethical Conduct for State Officers and Employees

It shall be considered unethical for any State officer or employee:

1. To accept, seek, solicit, or take directly or indirectly, any gift or benefit of more than insignificant economic value, including money, any service, gratuity, fee, property, loan, promise, or anything else of more than insignificant economic value from or on behalf of any individual or entity who is doing or is seeking to do business of any kind with the State or whose activities are

regulated or controlled in any way by the State, and the officer or employee has knowledge of such facts, under circumstances from which the officer or employee could reasonably have inferred that the gift or benefit was intended to influence such officer or employee in the performance of his official duties and under circumstances from which it is reasonable to assume that the officer or employee would be influenced in the performance of his official duties.

Application

The standards of ethical conduct set forth in this Code of Ethics shall be applicable without exception to all part-time and full-time officers and employees in the executive branch of the State of Maryland whether or not they are members of the Merit System or exempt from the provisions of the Merit System.

All officers and employees who have been appointed by the Governor shall conform to these standards without further directive. All other officers and employees who serve under a State appointing authority which is appointed by the Governor shall comply with the agency code of ethics to be issued by such respective authorities as provided for in Article VI hereof. Failure to conform to the standards of ethical conduct so prescribed may lead to removal from office, termination of employment, or other action as the particular case may require.

The appellants challenge the introduction of the Code on the ground that as a matter of state law it was inapplicable to Mandel because he was a constitutionally elected official. They also contend that its introduction was prejudicial and therefore it should have been excluded under Federal Rule of Evidence 403.

As the instructions indicate, however, the judge expressly informed the jury that under state law the Code did not apply to Mandel. He instructed them that they could consider the Code only for the limited purpose of illuminating whether Mandel acted with the requisite intent to defraud. He instructed the jury as follows:

> Now, during the trial a good deal has been said about the code of ethics, and at this point the Court will try to explain to the jury what part the code of ethics plays in this lawsuit, if any.
>
> A portion of the code of ethics promulgated by Marvin Mandel, the Governor of Maryland, has been introduced into evidence. As a matter of State law, this code does not apply to Marvin Mandel because it was intended to apply only to officers and employees of the Executive Branch of Government. The code does not deal with constitutionally elected officers such as the Governor. Nevertheless, the code may be looked to — the code may be looked to as a guide for determining the standard of conduct expected of public officials by the State of Maryland.
>
> You may consider compliance with or a knowing violation of such standards for whatever bearing it has, if any, on the issue of whether the Government has proved beyond a reasonable doubt that Defendant Mandel acted with intent to defraud.
>
> The failure of a public official to disclose a conflict of interest or the concealment thereof constitutes fraud only if it is done with intent to deceive and for the purpose of gaining some valuable undue advantage or injuring something of value.

When the district court's instructions concerning the Code are read in context with its very detailed instructions concerning intent to defraud, it is apparent that the jury could not have been misled or confused. The court explained to the jury:

> To act with intent to defraud means to act knowingly with the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self.

Thus, there is no justification for speculating that the jury convicted Mandel on the basis that the Code "proscribes not only impropriety, but the appearance of it."

The appellants' reliance on *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) is misplaced. *Morlang* involved a prosecution for conspiracy to bribe the director of the Federal Housing Administration in connection with an FHA-insured housing project. The essential element of the substantive crime was the solicitation by a public official of a bribe in return for either violating his official duty or being influenced in the performance of an official act. Thus, in *Morlang* it was necessary for the jury to determine what would constitute a violation of the director's official duty. We held that it was error for the judge to instruct the jury on general standards of conduct required of HUD employees which were "too indefinite and vague to be a part of our criminal law . . ." 531 F.2d at 192. We also pointed out that the jury should have been instructed only about the specific duties or modes of conduct expected of the director.

The instant case differs in several important respects from *Morlang*. First, the portions of the Code introduced at trial do not pertain to "broad ethical and moral precepts" as did the regulations rejected in *Morlang*. Second, and more importantly, the Code was admitted only for whatever bearing it might have on Mandel's intent to defraud and not as a standard of conduct. Mandel's knowledge of the Code and his promulgation of it to govern the actions of other public officials are relevant with respect to whether he acted knowingly with the specific intent to defraud.

The issue of intent is a factual question that can seldom be proved by direct evidence since there is no way to fathom or scrutinize the human mind. Intent may be inferred from the conduct of the defendant and from all facts and circumstances of a case which tend to show a mental attitude. "Collateral and related conduct may be considered by the jury for the purpose." *United States v. Browning,* 390 F.2d 511, 512 (4th Cir. 1968). In light of the inherent difficulty in proving intent, it is particularly important that a trial judge be given broad discretion when ruling on the relevance of evidence bearing on this issue. The Supreme Court has stated that those who attack evidentiary rulings on appeal

> have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." [citations omitted].

Hamling v. United States, 418 U.S. 87, 124-25 (1974).

I find no ground for reversal in the claim that the district judge abused his discretion by admitting this evidence.

III

The appellants also charge that the "court below abused its discretion in admitting evidence relative to . . . motivations of the Maryland General Assembly." The alleged breach of discretion involved the admission of evidence concerning Mandel's activities with respect to two bills calculated to advance the interests of his co-defendants. The appellants contend that this evidence was inadmissible hearsay.

The appellants' assignment of error is groundless for two reasons. First, as my brothers recognize, much of the testimony was not hearsay at all. Second, the hearsay statements properly were admitted under a recognized exception to the hearsay rule.

Proof of Mandel's influence on the vote that overrode his veto depended largely on circumstantial evidence. The government could not show that Mandel openly proclaimed his change of position on this legislation shortly after his co-defendants acquired their interest in the track that would be affected by it. The district judge took a common sense approach to the introduction of this evidence. He permitted both the prosecution and the defense to call state senators to explain the events that culminated in the overriding of the veto. In short, he allowed the principal actors to recount their own versions of this legislative drama.

Most of the evidence was not hearsay. The ten Maryland state senators who testified for the government primarily related the activity they had observed in the state capitol on the day of the vote that led them to believe the override of Mandel's veto was unusual. The senators noted that the override passed by a remarkably broad margin with most of Mandel's supporters in the majority. They also reported the conspicuous failure of Mandel's legislative aides to lobby, as they normally did, in support of his veto. Indeed, when Senator Snyder asked one liaison aide about the administration's position on the override, the aide simply shrugged his shoulders and walked away. These observations alone established a factual foundation for the senators' contemporaneous impressions that Mandel did not object to the veto override. Coupled with Eugene Casey's January 7th letter to all legislators about the recent change of ownership at Marlboro Racetrack, those impressions provided a basis for the senators' testimony that the override was suspicious. Thus, the senators' testimony about their observations, their statements about their own well-founded contemporaneous impressions, and their adoption on the witness stand of statements they made to other senators at the time present no evidentiary problems.

The senators, however, could not fully recount the events of the day without reference to statements made by their colleagues during the consideration of the override. They testified that they heard various members of the Senate discuss the Governor's lack of support for his veto or express amazement at the peculiarity of the circumstances surrounding the override. The controversy concerning the introduction of hearsay evidence centers on testimony about Senator Staten's declarations. This aspect of the case warrants special scrutiny because he was the majority whip and other senators recognized that he spoke authoritatively. Senator Crawford testified:

> We were in the Senate lounge, and I had already promised Senator Snyder that I would vote to override the veto because of his own problems in Hagerstown. I was approached by Senator Roy Staten, who was the majority whip at that time, and he told me in words to the effect that the Governor would like the veto overridden or, "Marvin won't mind having it overridden," or words to that effect.
>
> I then told Senator Staten, or words to the effect, "What the hell is going on here," and I had already promised Senator Snyder I was going to override anyway. I didn't care what the Governor wanted. This happened very quickly. The bells rang and we went back in to vote.

Senator Thomas also testified about a conversation in the Senate lounge with Senator Staten as follows:

> Q. What, if anything, did Senator Staten say regarding the attitude of Governor Mandel on this matter? A. I think he indicated that the Administration would not object to an override on the bill.
>
> Q. When you say the Administration, was that the phrase he used, "the Administration"? A. I think he said the Governor would not object.

The appellants argue that Senator Staten's declarations were inadmissible because he was not the Governor's agent. The critical issue, however, is not

whether Senator Staten was Mandel's agent, making his statements admissible under Rule 801(d)(2)(D). That claim has been resolved against the prosecution, and I find no reason for reopening it here. The critical issue is whether Senator Staten's statements, concededly hearsay, are admissible under an exception to the hearsay rule. The following colloquy which occurred while an assistant United States attorney was questioning one of the senators illustrates the issue:

> Q. Senator Snyder, the veto was overridden? A. Yes, it was.
>
> Q. I believe the vote was 31 to 8 in the Senate? A. Yes.
>
> Q. I believe you used the word amazement at one point about that vote. What observations did you make on the floor of the Senate that day, either of your own or on the basis of discussing the matter with other Senators that would contribute to your impression of amazement?
>
> Well, that is not asking facts. Shouldn't the question be what did you see, what did you hear, what did you observe?
>
> I think so. I think so.
>
> I object to hearsay, of course, your Honor.

This exchange demonstrates the problem of asking a witness to explain the events of the day by telling what he heard without resorting to hearsay. The district court resolved this dilemma by relying on Federal Rule of Evidence 803(24). This rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * * *
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact;

> (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

I believe that the district judge correctly held that the senators' hearsay testimony, particularly the statements of Senator Staten, satisfied all the requirements of the rule.

In the first place, the senators' hearsay statements have circumstantial guarantees of trustworthiness equivalent to those that support other exceptions to the hearsay rule. The senators made the statements while they were perceiving the very event about which they testified, namely the activity surrounding the vote on the veto. The statements expressed the senators' present impressions immediately before or after the override vote. Thus, the statements were quite like the hearsay declarations of present sense impression admissible under Rule 803(1). *See United States v. Iaconetti,* 406 F. Supp. 554, 559 (E.D.N.Y.), *aff'd,* 540 F.2d 574, 577-78 (2d Cir. 1976).

The availability of the declarants is another strong indication of the reliability of these statements. *See United States v. Leslie,* 542 F.2d 285, 290 (5th Cir. 1976). All the senators present on the day of the veto override, except two who had died before the trial, were available as witnesses. In fact, 17 of the surviving 38 senators actually testified. Thus, there was ample opportunity for the cross-examination of the senators who made or heard comments about the peculiarity of the vote on the Governor's veto.

The conduct of the Governor's legislative aides and Mandel's own admission of interest in other racing legislation favorable to his co-defendants corroborated the senators' testimony. A number of witnesses noted the absence of lobbying by Mandel's aides to support his veto. That testimony, as my brothers recognize, was not hearsay. Eyewitnesses also testified that Mandel himself later called several senators to private conferences at which he indicated his particularly strong desire for passage of the racing consolidation bill. In another instance, Mandel attended a meeting in a hotel suite where defendant Dale Hess and the Governor's legislative liaisons had gathered to review a list of the members of the Maryland House of Delegates and assess the prospects for lobbying the consolidation bill through that branch of the legislature. This evidence was not hearsay. Rule 801(d)(2)(A).

Senator Staten's statements carried additional guarantees of trustworthiness. He was the whip of the Governor's own majority party. The other senators recognized that he spoke authoritatively about the administration's position. Indeed, the evidence showed without contradiction that Staten worked closely with Mandel to secure passage of the closely related consolidation bill. Furthermore, all controversy about Senator Staten's role was thoroughly explored when he testified for the defense. He denied making the declarations attributed to him, and he also denied ever talking with Mandel about the veto override. Thus, the jury was furnished all the evidence on this point and was free to make its own assessment of credibility. A declarant's denial of the statements attributed to him does not make the hearsay statements inadmissible; it simply calls into question their credibility. *See United States v. Iaconetti,* 406 F. Supp. 554, 559 (E.D.N.Y.), *aff'd,* 540 F.2d 574, 577-78 (2d Cir. 1976).

From all these indicia of reliability, I conclude that the senators' hearsay testimony about the statements made by their colleagues, including Senator Staten, on

the day the veto was overridden amply satisfied the threshold test for admissibility under Rule 803(24).

The district court properly admitted this testimony because it also met the four subsidiary requirements of the rule. First, the statements were offered as evidence of a material fact within the meaning of Rule 803(24)(A). Evidence regarding Mandel's alleged change of position on the vetoed bill was highly probative of the government's contention that Mandel deprived the citizens of Maryland of his faithful services by favoring the business interests of the other defendants. *See United States v. Leslie,* 542 F.2d 285, 291 (5th Cir. 1976).

Second, the statements were more probative of Mandel's position on the veto override than any other evidence that the prosecutors reasonably could have procured. Rule 803(24)(B). The government offered circumstantial evidence of Mandel's failure to resist the override, but the unique difficulty encountered in proving that Mandel had his adherents "spread the word" through the legislature presented the type of special situation for which the hearsay exception in Rule 803(24) was designed. *See United States v. Leslie,* 542 F.2d 285, 290-91 (5th Cir. 1976). The district court correctly decided that the government should be allowed to elucidate a strong circumstantial showing with the best available testimonial evidence.

Third, the general purposes of the Federal Rules of Evidence and the interests of justice were served by admitting the senators' hearsay testimony. Rule 803(24)(C). The policy behind the federal rules favors the admissibility of all relevant and reliable evidence that aids in the prompt and efficient determination of truth. *See* Rule 102. Admission of the best and most trustworthy evidence available to show Mandel's activities concerning the veto override was consistent with this policy. In political corruption cases, courts should be particularly reluctant to withhold from the jury relevant evidence that sheds light on the defend-

ants' motives and intentions. *See United States v. Isaacs,* 493 F.2d 1124, 1161-62 (7th Cir. 1974). The interests of justice are not served by impeding prosecutions against public officials simply because the evidence available to the government is necessarily unusual. In view of the special problems attending the proof and interpretation of political maneuvers in a collegial legislative body, the jury was entitled to hear and assess the senators' complete knowledge of the events in which they participated when they voted on the veto.

Finally, the government's failure to furnish the names and addresses of the declarants to the defense attorneys does not require reversal. All the declarants were senators. All were known to the appellants. With the exception of two who had died, all were available to testify. As a matter of fact, the appellants do not rely on this provision of the rule for reversal. They had adequate notice of the government's intention to proceed as it did. Indeed, in the first trial of the case, which ended in a mistrial through no fault of any of the participants, a different presiding judge had made the same ruling about the admissibility of this evidence under Rule 803(24).

No other court has required literal compliance with the notice provision of the rule when the defendant had a fair opportunity to prepare his case. On the contrary, the principal cases considering the point have dispensed with strict compliance when the defendant could not show that he had been prejudiced. *See United States v. Leslie,* 542 F.2d 285, 291 (5th Cir. 1976); *United States v. Iaconetti,* 540 F.2d 574, 578 (2d Cir. 1976); *cf. United States v. Carlson,* 547 F.2d 1346, 1355 (8th Cir. 1976) (construing the same notice requirement in Rule 804(b)(5)).

Rule 803(24) was not intended to license the introduction of all hearsay. On the other hand, evidence which fairly meets its rigorous requirements should not be excluded. Admission of the testimony from the ten state

senators presented by the government did not transgress the rule. Therefore, I find no cause for reversal in the appellants' assignment of error charging the district judge with abuse of discretion in his application of the rule.

IV

Eugene Cory assigns error to the district court's refusal to permit him to impeach his former secretary, Katherine O'Toole, with testimony by Donna Gardiner, another secretary in his office.

The district judge permitted Gardiner to testify at length about O'Toole's veracity. He allowed Gardiner to contradict O'Toole's testimony about specific incidents. He also permitted Cory's counsel to ask Gardiner about O'Toole's reputation for truth and veracity in the community, an inquiry which Gardiner confessed she could not answer. The district court, however, did not permit Gardiner to express her own opinion about O'Toole's veracity, and he held that Gardiner could not "express her opinion as to Mrs. O'Toole's reputation in the community where she works." He based his ruling on the lack of a proper foundation for this type of impeaching testimony.

Although Gardiner had worked in the office with O'Toole for one and a half years, she apparently had neither seen nor heard of O'Toole for over four years. When a witness's credibility is at issue, the real question is the witness's reputation for truthfulness at the time of the trial and for a reasonably close period prior to trial. *United States v. Lewis,* 482 F.2d 632, 640 n.44 (D.C. Cir. 1973); *United States v. Null,* 415 F.2d 1178, 1180 (4th Cir. 1969); *McCormick on Evidence* § 44 at 92 (2d ed. 1972); Weinstein's Evidence ¶ 608[03] at 608-17 to -18 (1977). The district court, therefore, did not abuse its discretion when it excluded Gardiner's testimony on O'Toole's veracity at a time over four years before the trial.

In *Michelson v. United States,* 335 U.S. 469, 480 (1948), the Supreme Court noted that the

> propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject.

Applying that observation to this case, I find no ground for reversal in the alleged abuse of the trial judge's discretion.

V

Each of the defendants asserts that the evidence against him is insufficient to sustain his conviction. My brothers understandably did not decide these assignments of error, but since I think the judgments should be affirmed, I will briefly address them.

The majority opinion states the facts and discusses the law. Detailed repetition here would serve no useful purpose. Applying well recognized principles of appellate review explained in *Glasser v. United States,* 315 U.S. 60, 80 (1942), it is sufficient for me to note that the evidence amply supports the verdicts of guilty returned by the jury against each of the defendants.

The evidence established that several months after Mandel vetoed a bill favorable to the Marlboro Racetrack, his co-defendants acquired a controlling interest in the track. Twelve days later, the Maryland General Assembly, which had been misled by some of the defendants about the true identity of the track's new owners, overrode Mandel's veto without opposition from Mandel or his legislative aides. During the same period, some of Mandel's co-defendants secretly made an attractive real estate investment available to him. Subsequently, Mandel lobbied strenuously for the passage of a racing consolidation bill that would have benefitted Marlboro greatly. At the same time, certain

co-defendants conveyed to Mandel an interest in other valuable real estate and gave him generous gifts. All of this was accomplished in part through the use of the mails.

From this conduct, the jury could find beyond a reasonable doubt that the defendants, using the mails, engaged in a scheme to defraud the citizens of Maryland of the faithful services of Governor Mandel and of the right to have the state's business conducted honestly. The facts also showed that each defendant engaged in a pattern of racketeering activity. Thus, ample evidence supported the convictions for mail fraud and racketeering.

VI

In conclusion, I emphasize that analysis of the assignments of error for which this case has been reversed shows that they are based solely on unsubstantiated charges that the trial judge erred because he did not reiterate certain parts of his charge to the jury and because three of his countless rulings on the admissibility of evidence constituted an abuse of discretion.

I venture to say that none of our precedents supports the claim that a district court must give repetitive instructions on the same evidence. Nor have we insisted that a court instruct in the language suggested by a defendant when its charge to the jury adequately explains the point. Our precedents do not support the claim that we should reverse a district court on the ground of abuse of discretion for the admission of relevant evidence or the exclusion of impeaching evidence unless the defendant can show clear prejudice. Indeed, precedents that I have cited fully support the district court's rulings on the issues in this case. Finally, although we have no precedent regarding the residual exception to the hearsay rule embodied in Rule 803(24), other courts of appeals have written on the subject. The district judge's rulings fully conformed to the principles expressed by those courts. I therefore respectfully dissent.

see

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